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A Chapter dealing with Registration under the Land Transfer Acts, 1875 and 1897, has also been added.

H. W. E.
J. W. C.
A. D.

LINCOLN'S INN,
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# LIST OF ABBREVIATIONS.

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| A. C. | Appeal Cases in Law Reports (after 1890). |
| Ad. & El. | Adolphus & Ellis's Reports. |
| Amb. | Ambler's Reports. |
| And. | Anderson's Reports. |
| App. Cas. | Appeal Cases in Law Reports (1876—1890). |
| Atk. | Atkyns' Reports. |
| B. & Ad. | Barnewall & Adolphus' Reports. |
| B. & Ald. | Barnewall & Alderson's Reports. |
| B. & C. | Barnewall & Cresswell's Reports. |
| B. & P. | Bosanquet & Puller's Reports. |
| B. & P. N. R. | ,, ,, New Reports. |
| B. & S. | Best & Smith's Reports. |
| Bac. Ab. | Bacon's Abridgment. |
| Barn. Ch. Rep. | Barnardiston's Chancery Reports. |
| Beav. | Beavan's Reports. |
| Bing. | Bingham's Reports. |
| Bing. N. C. | Bingham's New Cases. |
| Bl. Comm. | Blackstone's Commentaries. |
| Bli. | Bligh's Reports. |
| Bli. N. S. | Bligh's Reports, New Series. |
| Bos. & P. | Bosanquet & Puller's Reports. |
| Bro. Ab. | Brooke's Abridgment. |
| Bro. C. C. | Brown's Chancery Cases. |
| Bro. P. C. | Brown's Parliamentary Cases. |
| Brod. & B. | Broderip & Bingham's Reports. |
| Bulst. | Bulstrode's Reports. |
| Burr. | Burrows' Reports. |
| Byth. by Rob. | Bythewood's Conveyancing by Robbins. |
| C. A. | Court of Appeal. |
| C. A. 1881, &c. | Conveyancing, &c., Act, 1881, &c. |
| C. B. | Common Bench Reports. |
| C. B. N. S. | ,, ,, ,, New Series. |
| C. C. R. | Crown Cases Reserved. |
| C. P. | Common Pleas. |

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| Cab. & El. | Cababé & Ellis's Reports. |
| Camp. | Campbell's Reports. |
| Car. | Charles. |
| Car. & P. | Carrington & Payne Reports. |
| Carth. | Carthew's Reports. |
| Ch. | Chancery. |
| Cha. Ca. | Chancery Cases. |
| Ch. D. | Chancery Division. |
| Chall. R. P. | Challis on Real Property. |
| Cl. & F. | Clark & Finnelly's Reports. |
| Co. Lit. | Coke on Littleton. |
| Coll. | Collyer's Chancery Reports. |
| Cowp. | Cowper's Reports. |
| Cox | Cox's Reports. |
| Cr. & J. | Crompton & Jervis's Reports. |
| Cr. & M. | Crompton & Meeson's Reports. |
| Cr. M. & R. | Crompton, Meeson, & Roscoe's Reports. |
| Cr. & Ph. | Craig & Phillips' Reports. |
| Cro. El.<br>Cro. Jac.<br>Cro. Car. | Croke's Reports, *temp.* Elizabeth, James I., and Charles I. |
| Cruise Dig. | Cruise's Digest of the Law of Real Property. |
| Dart, V. & P. | Dart's Law of Vendors and Purchasers. |
| Dav. Prec. | Davidson's Conveyancing Precedents. |
| De G. F. & J. | De Gex, Fisher, & Jones' Reports. |
| De G. J. & S. | De Gex, Jones, & Smith's Reports. |
| De G. M. & G. | De Gex, Macnaghten, & Gordon's Reports. |
| De G. & Sm. | De Gex & Smale's Reports. |
| Dick. | Dickens' Reports. |
| Digby, Hist. R. P. | Digby's History of the Law of Real Property. |
| Doug. | Douglas' Reports. |
| Dow & Cl. | Dow & Clark's Reports. |
| Dr. & War. | Drury & Warren's Reports. |
| Drew. | Drewry's Reports. |
| Drew. & Sm. | Drewry & Smale's Reports. |
| Dy. | Dyer's Reports. |
| East | East's Reports. |
| Eden | Eden's Reports. |
| El. & Bl. | Ellis & Blackburn's Reports. |
| El. Bl. & El. | Ellis, Blackburn, & Ellis's Reports. |
| El. & El. | Ellis & Ellis's Reports. |
| Eq. | Equity. |
| Ex. | Exchequer.<br>Exchequer Reports. |
| Ex. D. | Exchequer Division (in Law Reports). |
| Farw. Pow. | Farwell on Powers (2nd ed.). |

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| Fearne, C. R. | Fearne on Contingent Remainders. |
| G. Coop. | G. Cooper's Reports. |
| Giff. | Giffard's Reports. |
| H. Bl. | Henry Blackstone's Reports. |
| H. & C. | Hurlstone & Coltman's Reports. |
| H. & M. | Hemming & Miller's Reports. |
| H. & N. | Hurlstone & Norman's Reports. |
| H. L. | House of Lords. |
| H. L. C. | House of Lords Cases. |
| Ha. | Hare's Reports. |
| Inst. | Coke's Institutes. |
| Interp. | Elphinstone, Norton, & Clark on Interpretation of Deeds. |
| Ir. R. | Irish Reports. |
| Ir. Ch. Rep. | Irish Chancery Reports. |
| Ir. R. Eq. | Irish Reports in Equity. |
| J. & H. | Johnson & Hemming's Reports. |
| Jac. | Jacob's Reports (or, in citing statutes, James). |
| Jac. & W. | Jacob and Walker's Reports. |
| Jarm. Conv. | Jarman's Conveyancing. |
| Jarm. Wills | Jarman's Treatise on Wills (5th ed.). |
| Johns. | Johnson's Reports. |
| Jo. | Jones' Reports. |
| J. & Lat. | Jones & Latouche's Reports. |
| Jur. | Jurist Reports. |
| Jur. N. S. | ,, ,, New Series. |
| K. & E. | Key & Elphinstone's Precedents in Conveyancing (6th ed.). |
| K. & J. | Kay & Johnson's Reports. |
| Kay | Kay's Reports. |
| Keb. | Keble's Reports. |
| Keen | Keen's Reports. |
| L. J. | Law Journal Reports. |
| L. Q. R. | Law Quarterly Review. |
| L. R. | Law Reports. |
| L. T. | Law Times Reports. |
| L. T. A. | Land Transfer Act. |
| L. T. R. | Land Transfer Rules, 1898 (*see* W. N. 1898, p. 283, & 1899, p. 239). |
| Ld. Raym. | Lord Raymond's Reports. |
| Leon. | Leonard's Reports. |
| Lev. | Levinz's Reports. |

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| M. L. P. P. | Goodeve's Modern Law of Personal Property (3rd ed.). |
| M. L. R. P. | Goodeve's Modern Law of Real Property (4th ed.). |
| M. W. P. A. | Married Women's Property Act. |
| M. & Cr. | Mylne & Craig's Reports. |
| M. & S. | Maule & Selwyn's Reports. |
| M. & W. | Meeson & Welsby's Reports. |
| Mac. & G. | Macnaghten & Gordon's Reports. |
| Macq. | Macqueen's Reports. |
| Mad. | Maddock's Reports. |
| Man. & Gr. | Manning & Granger's Reports. |
| Mer. | Merivale's Reports. |
| Mod. | Modern Reports. |
| Moo. | Moore's Reports. |
| Moo. P. C. | Moore's Privy Council Reports. |
| Moo. & R. | Moody & Robinson's Reports. |
| My. & C. | Mylne & Craig's Reports. |
| Myl. & K. | Mylne & Keen's Reports. |
| N. C. | New Cases. |
| N. R. | New Reports. |
| N. S. | New Series. |
| Ow. | Owen's Reports. |
| P. | Probate, Divorce, & Admiralty Cases (in Law Reports since 1890). |
| P. C. | Privy Council. |
| P. D. | Probate Division Reports. |
| P. Wms. | Peere Williams' Reports. |
| Ph. | Phillips' Reports. |
| Plowd. | Plowden's Reports. |
| Pollock Contr. | Pollock on Contracts (6th ed.). |
| Price | Price's Reports. |
| Q. B. | Queen's Bench, or Adolphus & Ellis' Reports, New Series. |
| Q. B. D. | Queen's Bench Division (in L. R. 1876—1890). |
| R. S. C. | Rules of the Supreme Court. |
| Raym. | Raymond (Lord Raymond's, or Sir Thomas Raymond's Reports). |
| Rep. | Coke's Reports (cited by Parts, not by Volumes). / The Reports. |
| Rep. Ch. | Reports in Chancery. |
| Russ. | Russell's Reports. |
| Russ. & M. | Russell & Mylne's Reports. |

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| S. C. | Same Case. |
| S. L. A., 1882, &c. | Settled Land Act, 1882, &c. |
| Salk. | Salkeld's Reports. |
| Saund. | Saunders' Reports. |
| Sc. App. | Scotch Appeals (in Law Reports, 1865—1874). |
| Sch. & Lef. | Schoales & Lefroy's Reports. |
| Scott | Scott's Reports. |
| Shelford R. P. Stat. | Shelford's Real Property Statutes. |
| Shep. Touch. | Sheppard's Touchstone. |
| Sid. | Siderfin's Reports. |
| Sim. | Simon's Reports. |
| Sim. & St. | Simon & Stuart's Reports. |
| Sm. & G. | Smale & Giffard's Reports. |
| Sm. L. C. | Smith's Leading Cases. |
| Sol. J. | Solicitors' Journal. |
| Stra. | Strange's Reports. |
| Stud. Prec. | Clark's Student's Precedents. |
| Sty. | Styles' Reports. |
| Sugd. V. & P. | Sugden's Law of Vendors and Purchasers. |
| Swanst. | Swanston's Reports. |
| T. R. | Term Reports (Durnford & East). |
| T. & R. | Turner & Russell's Reports. |
| T. Raym. | Thomas Raymond's Reports. |
| Taunt. | Taunton's Reports. |
| Theob. Wills | Theobald on Wills (4th ed.). |
| Tud. L. C. R. P. | Tudor's Leading Cases in Real Property and Conveyancing. |
| Turn. & Russ. | Turner & Russell's Reports. |
| Tyrw. | Tyrwhitt's Reports. |
| V. & P. A. | Vendor and Purchaser Act. |
| V. & B. | Vesey & Beames' Reports. |
| Ventr. | Ventris's Reports. |
| Vern. | Vernon's Reports. |
| Ves. Sen. | Vesey Senior's Reports. |
| Ves. | Vesey Junior's Reports. |
| Vin. Ab. | Viner's Abridgment. |
| W. B. & C. | Wolstenholme, Brinton, & Cherry on the Conveyancing and Settled Land Acts. |
| W. N. | Weekly Notes L. R. |
| W. R. | Weekly Reporter. |
| W. & T. L. C. | White & Tudor's Leading Cases in Equity. |
| Wils. | Wilson's Reports. |
| Wm. Bl. | Sir Wm. Blackstone's Reports. |
| Wms. R. P. | Williams on Real Property. |
| Wms. P. P. | Williams on Personal Property. |

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| Wms. Saund. | Saunders' Reports by Williams. |
| Wms. Exors. | Williams on the Law of Executors. |
| Y. B. | Year Book. |
| Y. & C. C. C. | Younge & Collyer's Reports in Chancery. |
| Y. & C. Ex. | Younge & Collyer's Exchequer (Equity) Reports. |
| Y. & J. | Younge & Jervis's Reports. |

# INTRODUCTION TO CONVEYANCING.

## CHAPTER I.

### USES (*a*).

It was said by an eminent lawyer (*b*) that "even now a common purchase deed of a piece of freehold land cannot be explained without going back to the reign of Henry VIII.," that is, to the "Statute of Uses" (27 Hen. 8, c. 10), which effected a revolution in conveyancing, and therefore requires the most careful consideration by the student. In order to understand the changes that it brought about, it is necessary to bear in mind the methods by which real property was conveyed before the statute, and the nature of uses.

Conveyances operating at law before the Statute of Uses.

Before the statute freehold interests in possession in corporeal hereditaments were conveyed by feoffment, fine, or recovery, or by a release founded on a common law lease for years; incorporeal hereditaments (including remainders or reversions in corporeal hereditaments) were conveyed by fine, recovery, or deed of grant, followed, in the case of the grant of a seignory, rent, remainder, or reversion, by the

(*a*) The First Edition of the Work contained a short historical summary of the law of real property. The student is referred for this to "The History of the Law of Real Property," by Sir Kenelm Digby.

(*b*) The late Mr. Joshua Williams, Q.C.; see Wms. R. P. in the chapter "Of an Estate for Life," *ad init.*

attornment of the tenant in possession (Shep. Touch. 253), the necessity for which was done away with by 4 Anne, c. 16, s. 9.

Feoffment.

The most common method of conveying a freehold estate in possession in corporeal hereditaments was to make a *Feoffment*, which consisted, strictly speaking (M. L. R. P. 364), in "*livery of seisin*" alone, *i.e.*, delivery by the feoffor to the feoffee of possession of the land. This was effected by delivery upon the land of some part of the property, as a turf, a branch or twig of a tree, or the handle or fastening of the door of the house, in the name and as a symbol of the whole; and although it was usual to execute a deed called a "charter of feoffment" (see the form in Stud. Prec. Pt. II. p. 128), for the purpose of explaining the transaction and declaring what estate the feoffee was to take, still the estate passed by the livery of seisin and not by the deed. There could of course, be no livery of seisin in the case of incorporeal hereditaments, and the usual method of conveying them was a deed of grant. Hence the distinction that corporeal hereditaments "lie in livery," that is, can be actually delivered; incorporeal hereditaments "lie in grant." The reader will observe that land is the only hereditament of which the possession can be actually delivered, physically delivered, to another. You cannot physically deliver an advowson or an annuity; you can deliver a "gale" or yearly payment of the annuity, but that is not the annuity itself.

Thus the important distinction in conveyancing between corporeal and incorporeal hereditaments (*c*) consists in this —that corporeal hereditaments could be conveyed by delivering possession of them, or part of them in the name of the whole, while this could not be done in the case of an incorporeal hereditament. There was one important exception to this rule, viz., that where the person in possession was tenant for a term of years only, the reversioner could with his consent convey the reversion by entering on

(*c*) See as to this distinction, M. L. R. P. 12.

the land and making *livery* of it. (See further as to feoffments, *post*, p. 77.)

Fine or recovery.

It is not necessary to give any full explanation of fines or recoveries, as they were abolished by "The Fines and Recoveries Act, 1833" (3 & 4 Will. 4, c. 74). A fine was a fictitious action brought for the recovery of real estate by the person to whom it was to be conveyed, called the *conusee*, against the person who was to convey it, called the *conusor*. At a certain stage of the proceedings the action was compromised on the terms of the property vesting in the conusee. A recovery was a fictitious action for the recovery of real estate brought by the person to whom it was intended to be conveyed, called the *demandant*, against the person who was to convey it, or more generally against some person to whom it had been conveyed for the purposes of the recovery, called the *tenant to the præcipe*. The suit ran through all its stages, ending with a writ directing the sheriff to give seisin to the demandant. The student will find an interesting account of this subject in Sir F. Pollock's "Land Laws," ch. iv.; and if he wishes for more information he will find it in Shep. Touch., chap. 2, or in any edition of Blackstone's Commentaries published prior to 1833 (*d*); but he may for most purposes be satisfied in regarding fines and recoveries as common assurances which passed the legal interest.

Lease and release (*e*).

As to the lease and release. A release is a deed which enlarges an estate already existing. Thus, if a man be tenant for life or for years, the reversioner may by deed release to the tenant all his (the reversioner's) estate, so that the tenant becomes entitled to it, and his own estate is merged in it. Suppose, therefore, that a man seised in fee grants a lease for years and the lessee enters (for

(*d*) See also M. L. R. P. 66 *et seq.*, and the forms of Fine and Recovery in Stud. Prec. 131, 136. The practitioner may also consult 2 Pollock and Maitland, Hist. p. 94 *et seq.*; Challis R. P. 276, 279.

(*e*) Mentioned Y. B. 11 H. 4, f. 33, pl. 61; 31 Ass., pl. 25; and as to the necessity of entry by the lessee, 47 Ed. 3, pl. 76.

before entry a lessee at Common Law has no estate in the land, but merely what is called an *interesse termini* (*f*)), the reversioner can afterwards by deed release all his estate to the lessee, who thereupon becomes seised in fee. No livery of seisin was ever necessary, the lessee being already in possession. (Co. Lit. 270 *a*. See further, *post*, p. 13.)

In conveyances by feoffment, fine, or recovery, the change of possession was notorious; and in the case of lease and release the conveyance was made to a man who already had possession of, and was therefore known to have some interest in, the land: each of these conveyances operated at law, *i.e.*, passed the legal seisin. We now pass to the consideration of conveyances of the use only, or, as we should now say, operating in Equity only.

Conveyances operating in Equity before the Statute of Uses.

Bargain and sale.

Suppose that a man sold lands for money, received the money, and refused to make any conveyance. This was clearly against morality. The Common Law Courts could make him pay damages to the purchaser for the breach of contract, but it does not appear that they had any power of making him perform his bargain. The Court of Chancery, however, said that he must act honestly and perform his bargain, and declared that he was seised "*to the use of*," or, as we should now say, "*in trust for*" the purchaser. The legal interest remained in the vendor, who was still the tenant by the common law, and as such liable to perform all the services to the lord, while the purchaser was put into possession by the Court of Chancery, and was entitled to receive all the profits. Under these circumstances the vendor was generally very willing to make a legal conveyance to the purchaser.

The next step was simple; when a vendor wished to convey secretly, he executed a deed by which, for a pecuniary consideration, he bargained and sold his land to the purchaser. This, it will be observed, created no legal interest in the purchaser, but gave him a right, called "the

(*f*) M. L. R. P. 159.

use," enforceable in the Court of Chancery, to take possession of the land.

By degrees the plan was adopted of conveying the land by a common law assurance—*i.e.*, by feoffment, fine, or recovery—to trustees, as we should now call them, or to "feoffees," as you will find them called in the books, as joint tenants "*to the use of*" the rightful owner, who was called the *cestui que use*. The effect was that the feoffees were compelled by the Court of Chancery to deal with the land in accordance with the wishes of the rightful owner, the *cestui que use*, that on his death the use descended to his heir, while, as neither he nor the heir had any *legal* interest, the feudal incidents of tenure, which were very burdensome in the case of an heir being a minor and taking by descent, did not attach. If one of the feoffees died, the land remained vested in the surviving feoffees, who were already seised of the land, and therefore the burdensome incidents of tenure which attached at the time of death, in cases where it involved the succession of a new tenant, were avoided. The *cestui que use* could convey the use without any publicity. Before the 20th July, 1540 (from which date the Statute of Wills, 32 Hen. 8, c. 1, took effect), no man, except in some places by special custom, could devise his land, but he could devise *the use:* which gave the beneficial interest to the devisee.

Conveyances to feoffees to uses.

Again, when a man wished to convey to a near relation, he could covenant to stand seised to his use (see form in Stud Prec. 146), and in this case the consideration of natural affection was held sufficient to raise a use in favour of the covenantee, *i.e.*, the covenant operated as an equitable conveyance.

Covenant to stand seised (*g*).

The definition of a use given in *Chudleigh's Case* (1 Rep. 120 *a*) is: "A use is a trust or confidence, which is not issuing out of land, but as a thing collateral annexed in privity to the estate, and to the person touching the land: *scilicet*, that *cestuy que use* shall take the profits, and that

Uses.

(*g*) See further, *post*, p. 78.

the ter-tenant [*i.e.*, the feoffee] shall make estates according to his direction. So that he who hath a use hath not *jus neque in re neque ad rem*, but only a confidence and trust for which he hath no remedy by the common law, but his remedy was only by subpœna in Chancery" (*h*).

"*Jus in re*" means a proprietary right; "*jus ad rem*," a personal right of action; and the sense is that *cestui que use* had no rights recognised by a Court of Common Law; he had neither an estate nor a right of action at common law against the feoffee; for "use is nothing for which remedy is given by the course of the common law" (*i*). He had only a personal remedy in Chancery against the feoffee.

Observe (1st), that the use is "collateral" to the land, *i.e.*, it is not annexed to the possession of the land, but to the estate of the feoffee; (2nd), that it is annexed to the person of the feoffee so long as he holds the legal estate; and any person claiming under the feoffee (except a purchaser for value without notice), or, as it is sometimes said, any one in "in the per" (*k*) (*e.g.*, his heir-at-law), was liable to perform the use, for such a person takes the very estate of the feoffee. But any one who does not take the estate that was in the feoffee, but claims by title paramount to the feoffee (and those claiming under him), *i.e.*, any one in "in the post" (*e.g.*, his widow claiming her dower, his lord claiming by escheat), took the land discharged from the use, for there is no privity of estate in such cases. (See Butler's note, Co. Lit. 271 *b*, i. II.; and 1 Rep. 122 *a*, 139 *b*; Fearne, C. R. 291, note (*h*); 1 Cruise, Dig. Caps. 2 & 3.) Hence it was usual to make several feoffees to uses, so that dower should not attach, and to avoid escheat on the death of a feoffee.

In "in the per."

In "in the post."

(*h*) See the notes to *Tyrrell's Case* (Dy. 155 *a*) in Tud. L. C. R. P.; Challis R. P. 350; 2 Pollock and Maitland, Hist. 226; and, as to the original and early history of Uses, Digby, Hist. R. P., Pt. II., and 2 Bl. Comm. 327.

(*i*) Coke's Reading on Stat. of Uses; see 1 Cruise, Dig. 336.

(*k*) As to "in the per" and "in the post" see 4 L. Q. R. 362.

Several Acts were passed (1 Ric. 2, c. 9; 4 Hen. 4, c. 7; 11 Hen. 6, c. 5; 1 Ric. 3, c. 1; 1 Hen. 7, c. 1, and others) to restore the ancient publicity of conveyances; but we will pass to the Statute of Uses, 27 Hen. 8, c. 10.

Statute of Uses (1535—6).

It is impossible to over-estimate the importance of a thorough knowledge of this statute, which, as to real property, is the foundation of modern conveyancing.

The 1st section recites the evils which had arisen from feoffments to uses. This recital is well worth perusing (*l*); and if the reader will take the trouble to understand each word contained in it (all of which he will find explained in Blackstone) (*m*), he will have a very fair knowledge of old law. The section proceeds to enact to the effect following: Where any person or persons is, or are, *seised* of any manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any *other* person or persons . . . the latter shall be seised and deemed in lawful seisin, estate, and possession of and in the same hereditaments, to all intents and purposes, of and in such like estates as they had, or shall have, in the use, trust, and confidence. And the estate, title, right, and possession of the former shall be in the latter after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust that was in them.

This section speaks of persons being "seised," *i.e.*, having estates of freehold (for life, in tail, or in fee simple) in possession; and as no copyholder or leaseholder for a term of years is strictly speaking "seised" (*n*), uses declared

(*l*) It is set out in M. L. R. P. 276, note (*l*).

(*m*) 2 Bl. Comm. 327. The statute is printed in Digby, Hist. R. P., ch. vii. p. 345.

(*n*) *Leach* v. *Jay*, 9 Ch. D. 42. The student may be unable to reconcile the statement in the text with the form of recital common in assurances of copyhold: "Whereas A. is seised of Blackacre for an estate in fee simple at the will of the Lord according to the custom of the Manor of X." The explanation is that originally the word "seised" was applied equally to chattels and real estate, and meant "possessed" (M. L. R. P. 153, note (*u*)). That "seised" was not restricted to the possession of a

on the estate of a copyholder or termor confer equitable interests only, as the Act does not apply to them. A term of years can be created by a declaration of use on an estate of freehold, *e.g.*, land can be conveyed to A. in fee simple to the use of B. for 21 years.

It will be observed that there are two branches of the section; the first dealing with the use, the second dealing with the estate of the person who stands seised to the uses. By the first, the use is turned into a legal estate: by the second, the estate of the feoffee, or person who stands seised to the use, is vested in the *cestui que use* for the estate that he had in the use. Now, as the use was annexed to the estate of the person seised to the use, the right of the *cestui que use* to the rents and profits could exist only so long as that estate subsisted. It follows that the legal estate, into which, by the first branch of the rule, the use is converted, cannot be greater than the estate of the person seised to the use: for the *cestui que use* is to be seised "of the like estate as he had in the use": and that, by the second branch, only so much of the estate of the person seised to the use is taken out of him and vested in *cestui que use* as is coextensive with the use. To take examples:— Where the limitations are "to A. and his heirs to the use of B. and his heirs," by virtue of the first branch of the rule, the use to B. and his heirs is turned into a legal fee simple, and by the second branch, A.'s estate in fee simple is vested in B. for the estate that B. had in the use, *i.e.*, the whole fee simple is vested in B. and nothing remains in A. Where the limitations are "to A. and his heirs to the use of B. and the heirs of his body," B.'s estate in the use by the first branch is turned into a legal estate tail, and, by the second branch, part of A.'s estate in fee simple is vested in B. for the estate that B. had in the use, *i.e.*, an estate tail, and the residue of the fee simple is left in A. Where the limitations are "to A. for life to the use of B. and his heirs," B. takes

freeholder till long after the forms of pleading from which the recital is derived were established.

an estate to him and his heirs in the use for the life of A., and by the first branch this is turned into a legal estate *pur autre vie*, while under the second branch, A.'s life estate is vested in B.; and the result is that B. takes a descendible freehold determinable on A.'s death, for it is obvious that the use could not extend beyond the estate of the feoffee to uses. Where the limitations are "to A. and his heirs to the use of B. for 100 years, with remainder to the use of C. for life, with remainder to the use of D. and his heirs," by virtue of the first branch, B., C., and D. take the same legal estates as they took in the use, while by the second branch of the rule A.'s estate in fee simple is vested in them for similar estates, thus leaving nothing in A.

Declaration of uses.

The statute says nothing as to the time when the uses are to be declared. They may be declared either before or after the legal estate is vested in the person who stands seised to the use. When fines and recoveries were used, it was a common practice to declare by deed before the fine was levied, or the recovery was suffered, to what uses the conusee or demandant should stand seised (*o*). The instant that the legal estate became vested in him by the fine or recovery it passed out of him by virtue of the second branch of the clause under consideration into the *cestui que use*.

The power of declaring the uses after the property has become vested in the person who stands seised to the uses is of the utmost importance in modern conveyancing. Suppose that the limitations are "to A. and his heirs to such uses as B. shall appoint; and subject thereto, to the use of C. and his heirs." The effect of the conveyance is to vest a fee simple in C., subject to be defeated wholly or partially by any appointment, *i.e.*, declaration of uses, that B. may make. If B. appoints the uses "to D. and his heirs," D. becomes seised in fee simple and C.'s estate

(*o*) For examples of these deeds "to lead the uses" see Barton's Conveyancing, vol. ii. p. 52; and Wilde's Supplement to Barton, vol. iii. p. 810.

is defeated. If B. declares the uses "to D. for life," C.'s estate is postponed so as to admit D.'s estate, and the effect is that D. becomes seised for life with the remainder to C. in fee.

Except in the simple case of a conveyance in fee, the declaration of uses forms a most important part of the conveyance: and, in order that the legal estate may pass by virtue of the statute according to the uses declared, two things are necessary: first, that some one should be *seised* to the use of some *other* person; and, secondly, that the conveyance should not operate under the Statute of Uses; for on the construction of the statute it is held that a use cannot be limited on a use (*Tyrrell's Case*, Dy. 155; 1 Tud. L. C. R. P.). Thus in a feoffment, or a release founded on a lease for a year (which may either be a common law lease perfected by entry, or a bargain and sale for a year operating under the statute, *post*, p. 13) "to A. and his heirs to the use of B. and his heirs," the conveyance to A. operates at common law, not under the statute, and the statute vests the legal estate in B. But if the feoffment or release were made "to A. and his heirs to the use of B. and his heirs to the use of C. and his heirs," B. would become seised by virtue of the statute, and the operation of the statute would then stop, so that C. would take an equitable estate only. A bargain and sale "to A. and his heirs to the use of B. and his heirs," or a covenant to stand seised "to the use of A. and his heirs to the use of B. and his heirs," leaves the legal estate in A.: for the statute has produced all its effect in clothing the use raised in favour of A. with the legal estate: so that, if any further uses are declared, they give equitable interests only.

Although it was unnecessary, when the conveyance was by bargain and sale, to declare any uses in favour of the purchaser, for the very fact of the bargain and sale raised them by implication, it became the common custom to declare them. The reason appears to have been that there was always a risk that the deed might not be properly

inrolled (*post*, p. 12); if this occurred, the deed would take effect as a grant, provided that some estate was outstanding, such as an ordinary lease for years, so that the estate of the vendor was not in possession, and was therefore an incorporeal hereditament, and, as such, capable of being conveyed by deed of grant; and in this case the uses would properly be declared.

The conveyance to the person on whose seisin the uses are to be declared may be made either by the instrument containing the declaration of uses, or by a separate instrument. Thus, in a conveyance by lease and release, the release contains the declaration of uses; but in the case of a fine or recovery, the declaration of uses was always made by an independent instrument, either before or after the fine was levied or the recovery suffered.

As above stated, the statute has no effect unless there are at least two persons, one seised to the use of the other. Thus, a feoffment "to A. and his heirs to the use of B. and his heirs," before the statute, made A. seised in fee, as trustee, as we should now call him, for B., while B. took the use, a mere equitable interest which could be enforced in the Court of Chancery only. Since the statute the same feoffment would vest the legal estate in B., who would, in the eye of the law, become immediately seised in fee.

In the common case of a conveyance "to A. and his heirs to the use of A. and his heirs," or "unto and to the use of A. and his heirs," A. is seised in fee at Common Law, and as he cannot be a trustee for himself the statute never has any effect at all; and if the conveyance be for value, the words "to the use," &c., are mere surplusage (*p*). The reader must not, however, suppose that it is suggested that he should leave them out. When a form of words has been sanctioned by long-continued usage, for the purpose of expressing some particular meaning, the very fact of changing the form raises a presumption that the draftsman

(*p*) *Peacock* v. *Eastland*, L. R. 8 C. P. 281; Interp. 267. 10 Eq. 17; *Orme's Case*, L. R.

wishes to express some other meaning; any alteration in a common form is therefore full of danger, and is to be avoided by every young practitioner. Although, *if the conveyance be for value*, the words "to the use," &c., are mere surplusage, this is not the case in a conveyance without consideration, for then, if there be no declaration of use, the law implies, as it would have done before the Statute of Uses, a use in favour of the person conveying, and consequently the legal estate goes back or "results" to him by force of the statute, and the conveyance is ineffectual (*q*).

Resulting use.

The 4th and 5th sections of the Statute of Uses enact that when a person is seised of land, &c., to the use that some one else shall take a rent-charge; the latter shall be in actual possession of the rent.

A common example is a jointure rent-charge (2 K. & E. 671, and Stud. Prec. 87).

The 4th and 5th sections are sometimes of use when a rent-charge is created for the purpose of giving a qualification for the magistracy (*r*). If the grant is made at Common Law, the grantee does not come into possession of his rent-charge till some payment has actually been made. If it is necessary to put him into possession at once, and the state of the title affords no objection, this can be done by limiting the land "to K. and his heirs to the use that A. B. shall receive a rent-charge, issuing," &c., and subject thereto to the old uses (*s*).

Statute of Inrolments (1535—6).

We now come to the Statute of Inrolment of Bargains and Sales, 27 Hen. 8, c. 16. The reader will observe that if, prior to the Statute of Uses, A., seised in fee, bargained and sold his land to B. for a pecuniary consideration, although no estate passed at law, the effect was to raise a use or trust for B. which the Court of Chancery enforced. The effect, therefore, of the Statute of Uses, which gave the

(*q*) Interp. 286.

(*r*) Or, formerly, to create a vote; but this was put an end to by 48 Vict. c. 3, s. 4.

(*s*) *Heelis* v. *Blain*, 18 C. B. N. S. 90; *Lowcock* v. *Overseers of Broughton*, 12 Q. B. D. 369.

seisin to the *cestui que use*, was to enable any one to convey his legal estate in land by a secret bargain and sale. For the purpose of preventing this the Statute of Inrolments (27 Hen. 8, c. 16) enacted (*t*) that no hereditaments should pass from one to another whereby any estate *of inheritance or freehold* in any hereditaments, should take effect in any person, or any use thereof to be made by reason only of any bargain and sale thereof, unless the same were by writing indented, sealed, and inrolled within six months of the date, as in the Act mentioned, "to the intent that every party that hath to do therewith may resort and see the effect and tenor of every such writing so inrolled."

Lease and release after the Statute of Uses.

It appeared as if the Legislature had effectually provided for the publicity of all purchase-deeds relating to land; but the ingenuity of lawyers soon baffled them, and invented the celebrated conveyance by way of Lease and Release.

The operation of a lease and release before the Statute of Uses has already been described. Then a common law lease was made to the purchaser, who actually entered on the land; a release operating at Common Law was then made to him by the vendor. It has also been stated, that the Court of Chancery held that a bargain and sale for value operated as a declaration of the use. The Statute of Inrolments does not apply to interests less than a freehold, and therefore a bargain and sale for a year or a term of years took effect, notwithstanding the Act, *i.e.*, without inrolment. But as it took effect as the declaration of a use, the Statute of Uses applied to it, and the lessee, immediately after the execution of the bargain and sale, became in possession by virtue of the statute; and being in possession, he could take a release of the reversion (*u*). A conveyance made in this manner by a bargain and sale for a term operating under the Statute of Uses, followed by a

(*t*) See the text of this statute in Digby, Hist. R. P., ch. vii. p. 366.

(*u*) See 2 Bl. Comm. 339; M. L. R. P. 369.

release operating at Common Law, forms the conveyance by lease and release which may still be used, though in practice it is obsolete.

The operative part of the bargain and sale, or lease for a year, ran somewhat as follows:—"In consideration of five shillings paid by the said [*purchaser*] to the said [*vendor*] the said [*vendor*] doth bargain and sell unto the said [*purchaser*], his executors, administrators, and assigns, all those [*parcels*] to have and to hold the same, with the appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, from the day next before the day of the date of these presents, for the term of one whole year next ensuing." (See form in Stud. Prec. 141.)

Here, it will be observed, nothing is said about the use; but, as there is a valuable consideration, the use is implied for the purpose of carrying out the declared intention of the parties; and the Statute of Uses puts the purchaser into possession.

The operative parts of the release were:—"The said [*vendor*], in consideration of £——, doth hereby release unto the said [*purchaser*] and his heirs all those [*parcels*] to hold the same, with their appurtenances, unto the said [*purchaser*] and his heirs." Stopping here, the purchaser is in by Common Law, and has a seisin, on which uses may be declared: if the conveyance was to himself, the use would be "to the use of the said [*purchaser*] his heirs and assigns for ever." (See form in Stud Prec. 143.)

Transmutation of possession.

All conveyances which do not take effect by virtue of the Statute of Uses are said to operate by transmutation of possession, for the conveyance itself transmutes the possession of the land to the purchaser. (See on this M. L. R. P. 372; *post*, p. 77.)

Bargains and sales and covenants to stand seised merely operate as declarations of use by the conveying party, and the possession of the land passes by force of the Statute of Uses.

Statute of Wills 1540).

The Statute of Uses had another very important effect—

an effect which was put forward as one of the grievances sought to be redressed by the Pilgrimage of Grace, the great northern rebellion, which took place shortly after the statute was passed. Before the Statute of Uses no man could (except in some places, by virtue of a custom) make a will of land. The plan adopted was to make a feoffment to the uses of the will, and then to devise the uses (M. L. R. P. ch. xv.). The effect of the Statute of Uses was entirely to prevent this being done. For as there was no consideration for the use, a use resulted back to the feoffor, and by force of the statute he remained seised. Accordingly, one of the grievances alleged by the rebels was, that now no man could by will provide for his wife and younger sons. To remedy this, the Statute of Wills was passed in 1540 (32 Hen. 8, c. 1), which, *inter alia*, enabled a man to devise his lands held in socage tenure. In 1660 all tenures, except copyholds, customaryholds, and leaseholds, were by 12 Car. 2, c. 24, turned into free and common socage.

Subsequent changes in law.

The subsequent changes in the law of conveyancing that are of importance to be borne in mind are the following:—

1. The Statute of Frauds, 1677 (29 Car. 2, c. 3), made it necessary for all conveyances of real property (excepting certain leases) to be *in writing*, the effect being to render a feoffment with livery void, unless evidenced by writing. (See *post*, p. 77.)

2. In 1833 fines and recoveries were abolished by "The Fines and Recoveries Act, 1833" (3 & 4 Will. 4, c. 74).

3. In 1841 an Act was passed rendering a release as effectual for the conveyance of freehold estates as a lease and release (4 & 5 Vict. c. 21). (See *post*, p. 78.)

4. Three years later an Act to simplify the transfer of property was passed (7 & 8 Vict. c. 76), but was repealed the year following by 8 & 9 Vict. c. 106.

5. "The Real Property Act, 1845" (8 & 9 Vict. c. 106), made all corporeal hereditaments *lie in grant* as well as in livery, and provided that a feoffment, other than under a

custom by an infant, partitions, exchanges, leases, assignments, and surrenders, with various exceptions, made after the 1st of October, 1845, should be void at law *unless by deed.* (See *post*, p. 77.)

The principal Acts that have since been passed having reference to conveyancing are—

"The Vendor and Purchaser Act, 1874."

"The Conveyancing Acts, 1881, 1882, and 1892."

"The Settled Land Acts, 1882 to 1890."

"The Married Women's Property Acts, 1882 and 1893."

"The Land Transfer Acts, 1875 and 1897."

And the more important provisions of such Acts are subsequently dealt with. (See for the references to such provisions the Index and Table of Statutes.)

## CHAPTER II.

### ON THE INTERPRETATION OF LEGAL DOCUMENTS.

No one is likely to become a good draftsman (*i.e.*, a person whose drafts are precise and free from inconsistencies or superfluous words, and therefore lucid) unless he understands the principles by which a person perusing them will be guided in interpreting them, that is, in endeavouring to discover the author's meaning.

Statement of the general problem.

If a person has wishes or intentions which he wishes to communicate to another, he does so by means of physical signs addressed to the senses. There are many signs that he can make use of; they may be addressed to any of the senses. Thus a blow, which is addressed to the sense of touch, affords strong indication that the person who gives the blow is angry with the person struck. The sign may be addressed to the eye, as where a man nods to another; the nod may mean "yes" or "no." The sign may be addressed to the ear, as in the case of speech. Generally, signs are more readily interpreted when they are addressed to two senses at once; it is easier to understand a person speaking to us if we can see the expression of his face.

In all these examples the sign is fugitive, so that if we wish subsequently to discover what wishes a man expressed at a particular time, we cannot refer to the sign itself, for it no longer exists; all that we can do is to endeavour to remember it, or to obtain such evidence concerning it as is afforded by the memory of others.

Sign should be permanent.

It is obvious that if a man wishes to preserve an accurate record of what his wishes or intentions were at a

particular time, he should express his wishes or intentions by signs that are permanent. Then there can be no question in the future as to what the signs were; the only question that can arise is what the signs mean. For example, it is not an uncommon thing to commemorate great national events by erecting monuments in stone. The sign itself, the monument, is palpable; the only difficulty is to discover what is meant by it. Some antiquarians, for instance, believe that Stonehenge is a monument raised to commemorate some particular event in our history; no doubt this may be so, but although the sign remains, we do not know what it means.

Writing, a permanent sign.

The art of writing affords a most convenient method of expressing one's intentions by signs which are readily preserved. A person accustomed to writing can express himself as clearly as in ordinary conversation, and it is probable that he will endeavour to express himself with greater accuracy in writing than in conversation, for he knows that, if he fails to express himself with accuracy in writing, the error may be irreparable; he may not learn that he has been misunderstood, or he may not have the opportunity of explaining himself; while a similar error made in conversation would be detected and repaired immediately; for these reasons the expression of a man's intentions as contained in writing is generally more accurate than that of ordinary conversation.

Superior accuracy of writing recognised by the law of England.

The law of England recognises the superior accuracy of writing to spoken words as a means of expressing intentions, when it declares that if a contract is reduced into writing, it shall be proved by that writing and nothing else; or when it declares that no action shall be brought to charge a person who has entered into contracts of certain natures, unless they be reduced to writing: or that a will must generally be in writing; the object in all these cases being to exclude uncertainty arising from trusting to men's memory of what has been said, and to prevent perjury.

One word as to a source of confusion; we commonly speak of a writing containing the expression of a contract as "the contract." In strictness the phrase "the contract" applies to the engagement between the parties, while the writing is the expression of that engagement.

Expressed intentions.

In all these cases, where a written instrument is the only evidence that we may make use of for the purpose of ascertaining a man's intention when he wrote it, the sole question for our consideration is what are his *expressed* intentions: a different thing, it will be observed, from his intentions, as he may have had some intentions that he did not express; or his real intentions may have been something different from those expressed in writing. The question always is, not what the parties intended to say, but what is the meaning of that which they have said, of the words which they have used in the written document (*a*).

The meanings of the words employed.

The proposition that when we are interpreting a document we are seeking the writer's *expressed* intentions, is sometimes enunciated as follows: "In interpreting a document we have only to discover the meanings of the words employed." The latter form of expression is not very accurate, because the same word may be used in different meanings by different persons or by the same person under different circumstances. A sailor and a housemaid may mean things very different by the same word "sheet." An eminent lawyer once published a treatise on election, which treated of a doctrine of theology, not as might have been expected of the equitable doctrine of election. Again, the words used to express the same thing will be different when used by different persons; they will depend upon the circumstances, character, and habits of the writer. A common instance is afforded by the use of slang terms, for probably the language used by a professional thief, in describing his adventures, would be unintelligible to most educated men. Again, the meaning which the ordinary usage of society affixes to a word changes with the lapse of time: "Jolly," as used in

(*a*) See Interp. ch. iii., "Expressed Intentions."

the "Faerie Queen," meant something different from what it means now.

If every word bore at this present time only one meaning, and had never borne a meaning different from that which it now bears, it would no doubt be correct to say that the meanings of the words employed by any writer are identical with his expressed intentions. If we know accurately the circumstances, character, and habits of a writer, we can arrive with a high degree of probability at the meaning in which he used each word; and that (it will be remarked) will be sufficient for our purpose; for as it is evident from the fact of the document existing, that the writer desired to express some intention, we must put some interpretation on it, and we shall have done our utmost when we have discovered that it is more probable that the words used in it were used by the author in some meanings than in any others.

Unfortunately, although a writing may be preserved, still the longer the time that has elapsed since the author wrote it, the less certain can we be as to the meaning in which he used his words. We have difficulty in ascertaining his circumstances, character, and habits, and in default of being able to do so, we are forced to put upon his words the meanings which the ordinary usage of society affixed to them at the time when he used them; and we may be in doubt as to what those meanings were, for, owing to the changes produced by time, they may have been different then from what they are now. We are also uncertain whether the words did not at that time bear a technical or conventional sense, and whether they were not used by him in that sense.

A word has generally more than one meaning.

These considerations show that we cannot speak of a word as having only one meaning: the problem that we have to solve in any given case is to discover in which of its meanings the author used it. When we have solved this problem, when we have affixed to each word the meaning in which it was employed by the author, then, and not

before, can we say that the meaning of the words used by the author is identical with his expressed intentions.

Two classes of evidence as to meaning of words.

We can call to our aid, as to the meaning in which the words were used, evidence of two different classes, *extrinsic* evidence and *intrinsic* evidence (*b*). By "extrinsic evidence" is meant evidence not contained in the document; "intrinsic evidence" is evidence derived from the contents of the document.

Since the object of interpretation of a writing always is to ascertain the *expressed meaning* or intention of the writer, it is not allowable (for purposes of interpretation) to adduce any evidence to prove an unexpressed intention varying from that which the words used import. Interpreters have to deal with the written expression of the writer's intention, and Courts of Law to carry into effect what he has written, not what it may be surmised, on however probable grounds, that he intended only to write. One has to consider the meaning of the words used, not what one may guess to be the intention of the parties.

Extrinsic evidence.

But then, for the purpose of applying the instrument to the facts, and determining what passes by it and who take an interest under it, evidence is admissible of every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it; for the meaning of words varies according to the circumstances with respect to which they were used. But no extrinsic evidence of the intention of a party to the instrument, from his declarations or statements, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to be written.

The distinction, therefore, must always be carefully borne

(*b*) See Interp. ch. iv. ("Extrinsic Evidence as to Meaning of Words"); *ib.* ch. vi. ("Intrinsic Evidence").

in mind between (*a*) evidence to show what the intention is which is expressed in the instrument; and (*b*) evidence to prove an intention expressed otherwise than by the written words of the instrument itself. The latter has been called "direct evidence of intention," *i.e.*, of intention not expressed by the writing itself; and sometimes it is referred to as "parol evidence" merely, a phrase which is misleading, because it is applicable also to extrinsic evidence as to the circumstances, the position and relations of the parties, which is admissible in order to explain the meaning of the written words.

Intrinsic evidence.

"Intrinsic evidence" consists of such indications of the meaning of particular words or phrases, used in the writing, as are derived from a consideration of the whole context or contents of the writing itself. For instance, suppose a testator in one part of his will uses the phrase "issue of A.," which, in its proper sense, includes all descendants of A., but we find in another part of the will a reference to A. as the "father" of the said issue, from this we infer that by "issue" the testator meant only children of A. The author of the instrument, in such a case, is, it is said, "his own dictionary."

Direct evidence of intention.

But "direct evidence of intention" is evidence of intention as an independent fact, apart from the intention expressed in and evidenced by the writing. For example: suppose a will contains an express gift of a house to "my son John." Evidence would not be admissible to show that the testator, even just before he executed the will, said that he intended to give that house to his son William, or that he gave instructions that his will should contain a gift of the house to his son William.

Evidence to rectify.

Of course the admissibility of evidence in order to interpret an instrument must be distinguished from its admissibility in order to rectify the instrument on the ground of mistake or fraud; *i.e.*, to show that the instrument as executed is not in accordance with the real intentions of its author. Evidence in such cases is admitted, not for the

purpose of interpreting the written document as it stands, but to show that the written document ought to be different from that which it actually is (*c*). But "interpretation has to deal not with conjectured but with manifest intent, and a supposed intent which the parties have not included in their chosen and manifest form of expression cannot, save for exceptional causes, be regarded" (Pollock, Contr. 234) (*d*).

From these considerations it will be apparent that when we wish to interpret a document, that is, to discover the meanings in which the author used the words in it, we must endeavour to discover his circumstances, character, and habits at the time of writing. In other words, we must discover to what class of society he belonged, the time at which he wrote, the meaning in which his words would have been used at that time by persons of that class; and, having regard to his character and habits, whether he used them in a different meaning; whether it is probable, having regard to the subject-matter of the document, that they were used in a scientific or technical sense; whether the document was a private document, by which is meant a document addressed to a limited class of persons only; and, if so, whether the words bear a special meaning, having regard to the status of the persons addressed. We may properly admit both extrinsic and intrinsic evidence to enable us to ascertain any of these facts. We must not, however, admit extrinsic evidence of declarations of the author that any of

(*c*) See *Ball* v. *Storie*, 1 Sim. & St. 210; *Ex parte Morgan*, 2 Ch. D. 72, at p. 84; *Welman* v. *Welman*, 15 Ch. D. 570; *Olley* v. *Fisher*, 34 Ch. D. 367; Interp. p. 5; Pollock, Contr. 493.

(*d*) See for example *Cato* v. *Thompson*, 9 Q. B. D. 616, where, on a sale of houses, there was an express contract to make a good marketable title. Evidence that the purchaser knew at the time of the contract that there was not a good marketable title by reason of the existence of restrictive covenants, was held not admissible for the purpose of modifying the express contract; but Lindley, L.J., observed that such evidence would be admissible in an action to reform the contract, though not for the purpose of construing it.

his words should bear a special meaning in the document under consideration; for that would be to admit evidence to prove an intention on his part not expressed in the document, or, in other words, we should not be interpreting the document alone, we should be interpreting it together with other expressed intentions of the author. When, however, we admit extrinsic evidence of circumstances for the purpose of showing that the words employed bear a special meaning having regard to the persons to whom the document is addressed, we are not seeking for evidence of intentions of the author not expressed in the document; for, as already stated, the status of the persons to whom the document is addressed forms an important element in determining the meaning of words. For instance, if A. writes to B., "I will come to see you at the House," the place meant would probably be the House of Commons if B. was a Member of Parliament; but if B. was a member of the Stock Exchange, which is commonly referred to by its members as "the House," the Stock Exchange would probably be the place intended.

The reader will now be able to understand the rules for the application of extrinsic evidence to the interpretation of documents.

Rules for the employment of extrinsic evidence.

Rule I. When the words used in a document are in their primary meanings unambiguous, and when such meanings are not excluded by the context, and are sensible with reference to the circumstances in which the author was placed at the time of writing, including in such circumstances the status of the persons to whom the document was addressed, such primary meanings must be taken to be those in which the author used them.

Rule II. Extrinsic evidence is admissible for the purpose of determining the primary meanings of the words employed, but not for any other purpose whatsoever.

These rules require the following explanatory observations:

Primary meaning.

1st. By "primary," sometimes called "literal" meaning, we mean not the primary etymological meaning, but the

meaning usually affixed to the words at the time when the author wrote by persons of the class to which he belonged, as modified by his personal character, or the meaning in which the words would have been used by such persons, having regard to the circumstances in which the author was placed at the time of writing, or the meaning which it can be conclusively shown he was in the habit of affixing to them.

Of course, as was said by Sir G. Jessel, M.R. (*Wallis* v. *Smith*, 21 Ch. D. 243, at p. 254), if cases have laid down a rule that in certain events words are to have a particular meaning, and that has become a settled rule, it may be assumed that persons in framing written instruments have had regard to settled law, and may have purposely used words which, though on the face of them they have a different meaning, they know, by reason of the decided cases, must bear a particular or special meaning.

Technical language.

2nd. If technical or scientific words occur in a document relating to the art or science to which they belong, the technical or scientific must be considered to be the primary meaning.

Example.

For instance, if some word or phrase of ascertained meaning in law occurs in a deed, such meaning must be conclusively affixed to it. Most laymen who are silly enough to draw their own wills offend against this rule. Instead of attempting to state their wishes in common language, they constantly go out of their way to employ technical words which they do not understand. A common blunder is to use the word "issue" when "children" are meant. "Issue" is a technical word, which exactly corresponds to "descendants;" so that the interpretation put on such a will generally is different from what the testator intended. One amusing instance has been handed down by tradition. A layman drawing his own will looked at his marriage settlement, and finding after every gift the words "but in trust only," considered that they were words of great efficacy, and inserted them in several places in his

will, the result being to disappoint all the objects of his bounty.

Private documents.

3rd. If words in a private document bear a special meaning, regard being had to the persons to whom they are addressed, the special must be considered as the primary meaning.

This observation is sometimes of use in interpreting letters. It does not apply to ordinary legal documents which, in contemplation of law, are addressed to all the world. Consider the commencement of a deed-poll: "To all to whom these presents shall come;" and that an indenture "Witnesseth," *i.e.*, preserves testimony for the use of any person who requires it.

4th. By the words "sensible with reference to the external circumstances," it is not meant that the external circumstances render it more or less reasonable or probable that the primary meaning of the words used is that which the author affixed to them; it is enough if they do not exclude it, or, in other words, if they do not deprive the words of all reasonable application according to such primary meaning.

Incorporated public documents.

Sometimes it happens that a public document is incorporated into another document; and then the questions arise, are we to consider the time of the adoption, or the time of the composition of the adopted document, as "the time of writing"? and are we to consider the circumstances of the original author, or those of the person who has adopted it, as the "circumstances" under our rule?

Popular meaning.

It is evident that the person who adopts a public document does not necessarily employ the words in it in the same meanings as those in which he would have used them in an original document. There are two other meanings in which he may have used them, viz., in their primary meaning, as employed in the adopted document, or in their popular meaning. By popular meaning is understood the interpretation that has been put upon the words in that particular document by general consent; for we find that

a public document is constantly interpreted by persons ignorant or careless of the true rules of interpretation, until after the lapse of a certain time common usage may affix to some of the words or phrases contained in it a special meaning not necessarily the same as that which they bore when first written, or as that which they would have borne if used in an original composition by the person who has adopted them. The strong presumption is that he has affixed the popular meaning to such of the words as have acquired it: for he knows that the document which he is composing will be interpreted by persons who are acquainted with the earlier document and the popular meaning of the words in it, and who are likely therefore to affix that meaning to them: while, if the words have acquired no such meaning, in other words, if the adopted document has habitually been interpreted correctly, the presumption still is that the person adopting it uses it in the sense in which it is habitually interpreted; in other words, he affixes the same meanings to the words as those at which he would have arrived had he applied our rules to the interpretation of the adopted document. These considerations lead to the fifth explanatory observation.

5th. The primary meaning of the words in an adopted public document is their popular meaning. But if they have acquired no such meaning, or if the circumstances of the person who has adopted them are such as to rebut the presumption of his acquaintance with them, their primary meaning is to be ascertained having regard to the external circumstances and time of writing of the author of the adopted document.

Statutes.

The rule as to adopted documents has two important practical bearings. We very often find that a modern Act of Parliament adopts in great part the language of an older Act on the same subject which may have received judicial interpretation; such interpretation (even if incorrect) is an authoritative interpretation, and the meaning which the words bear according to it is the "popular" meaning within

the meaning of the last observation. When, therefore, we find clauses inserted in an Act taken from an older Act, we should endeavour to ascertain if there has been any judicial decision as to their meanings in the older Act, and if this be the case, we must (subject to the application of Rule IV., *post*) conclusively assume that the Legislature used the words in the meaning affixed to them by the decision. (*Ex parte Campbell*, L. R. 5 Ch. 703.) And on the other hand, if we find the clauses slightly altered, it affords some presumption that they were not intended to bear that meaning.

Common forms.

The common forms used by conveyancers are public documents. They have been brought into their present shape by the efforts of generations of conveyancers, and while they have been modified from time to time in consequence of changes in the law, they remain substantially what they were many years ago. The meaning affixed to them by the usage of conveyancers, is the "popular" meaning in the sense in which that phrase is used in the fifth observation. It follows that, where a draftsman wishes to express a meaning which can be expressed by a common form, he should always employ it, for all lawyers will put a correct interpretation on his language, without hesitation; while, if he endeavours to express the same meaning in a different form of words, he raises a presumption against that meaning, owing to his employment of unusual language, and he causes an unnecessary expenditure of time and labour to the person perusing the draft. Many students beginning conveyancing object to the common forms on account of the apparently ungainly language in which they are expressed; but a more careful study will, in most cases, show the reason for the employment of every word in them; and, even if the student could express the same meaning more concisely and elegantly, there would be danger in doing so, for the reasons above stated.

The author strongly advises the student to study the common forms very carefully, so as to understand the

general scheme on which each one of them is founded, and the reasons which have led conveyancers to choose the words in which they are generally expressed.

Adopted private documents.

The case of an adopted private document is rather different, for, although we may be acquainted with the position of the person who adopts it, we may be ignorant of the existence of the earlier document, and of the position of its author; it follows, that in the interpretation of an adopted private document, we must take the time of adoption for "the time of writing," and must consider "the external circumstances" of the person adopting the earlier document, and not those of its original author. These considerations lead us to the sixth explanatory observation.

6th. The primary meaning of the words in an adopted private document must be ascertained, having regard to the circumstances of the person who has adopted them at the time of adoption.

Intrinsic evidence (*e*).

The next question for our consideration is the following: "What intrinsic evidence, that is, what evidence derived from the consideration of the document itself, can we obtain as to the meaning which the author has affixed to his words?" It is obvious that intrinsic evidence will often give information as to the time of writing and circumstances of the writer, and that with greater certainty than extrinsic evidence; or, to use the language that we have hitherto adopted, intrinsic evidence will enable us to discover the primary meaning of the words employed. But the more important use of intrinsic evidence is for the purpose of removing apparent inconsistencies or contradictions. It may happen that when we affix the primary meanings to the words employed, we arrive at inconsistent or contradictory intentions on the part of the author. We are therefore led to suppose that he has employed some of his words at least in other meanings; for it is reasonable to suppose that he intended that the whole of the document should be

(*e*) See Interp. ch. vi. pp. 76 *et seq.*

consistent, and that he has used each of his words in such a meaning as will have this effect. To discover, therefore, the author's intentions, we must endeavour to affix to some of the words employed such other of the meanings *which they properly bear* as will remove the apparent inconsistencies and contradictions. We must study, therefore, the whole of the document before we endeavour to place the final interpretation on any part of it, and must not consider any word or phrase isolated from the context. We must remember that the author may have employed the same word in different meanings in different parts of the same document, and that the context will be our only guide to discover such meanings. If a word occurs that bears a scientific or technical meaning, the context may alter or control it.

These considerations lead us to the following rules for the employment of intrinsic evidence:

Rules for employment of intrinsic evidence.

Rule III. Intrinsic evidence is admissible for the purpose of discovering the primary meaning of the words employed.

Rule IV. When the primary meaning of any word is excluded by the context, we must affix to that word such of the meanings which it properly bears, as will enable us to collect uniform and consistent intentions from every part of the document.

A striking example of the meaning of a word being determined by the context is afforded by the phrase "The Scriptures" as used in the New Testament: the phrase used elsewhere includes the whole of the New Testament, but the phrase when used in the New Testament itself does not include any part of it.

The rule which we have just considered is of special importance when we are interpreting an adopted public document. Although, as we have seen, the presumption in such a case is that the person who adopted it intended to retain in their popular meanings such of the words as have acquired them, yet the context may show either that he intended them to bear the meanings which were their

primary meaning at the date of the composition of the earlier document, or that he intended them to bear the meanings which they would have borne if they had stood in a document composed by him at the time of adoption. The context may also rebut the presumption that he intended the words in the adopted document, which had not acquired a popular meaning, to bear the meanings which they bore at the date of the original composition of the earlier document, and may show that he intended them to bear the meanings which they would have borne if they had stood in a document composed by him at the time of adoption.

Difficulties caused by the author.

The difficulties that we shall encounter in the application of the foregoing rules are not caused by the author of the document, but arise solely from the difficulty of obtaining the necessary evidence. We now come to difficulties of a totally different class, viz., those caused by the author himself. He may not have had sufficient clearness of conception to form definite intentions, or sufficient mastery over language to express them; he may also have changed his mind during the composition of the document; or again, he may have misled us through ignorance of the meanings that we should be led by our rules to affix to his words, and his language may, for one or other of these reasons, contain contradictions or ambiguities.

If the document under consideration has been in part adopted from an earlier document, ambiguities and contradictions may arise from the fact that the person who has adopted it was ignorant of the rules by which he ought to construe the adopted document, or from his being ignorant of the popular meaning which some of the words in it may have acquired.

Contradictions.

In cases where a document contains apparent contradictions, we are sometimes able to reconcile them by the use of further evidence as to the circumstances and time of writing of the author; but when this is not the case, we must reject all but one of the inconsistent statements if we are to give any effect to the document. The question

arises, which of them is to be rejected, which retained; and it is of importance to remember, in seeking the answer to this question, that it is not properly speaking a question of interpretation, but a question as to what is the subject-matter to be interpreted. We have first to apply our rules of interpretation to ascertain what intentions are expressed in the document, and, if we find that these intentions are inconsistent, we have further to consider which of them is most probably the intention which the author desired to express. The Law of England contains rules as to which of inconsistent intentions expressed in legal documents to reject, which to prefer; but they are too difficult for an elementary treatise.

Ambiguities.

We now have to consider the case of ambiguities. Ambiguities may be divided into two classes. An ambiguity of the first class, called a "patent" ambiguity, occurs when the intentions of the author, as expressed on the face of the document, are ambiguous. An ambiguity of the second class, called a "latent" ambiguity, occurs when the intentions of the author, as expressed on the face of the document, are free from ambiguity, and the ambiguity becomes manifest only when we consider some of his circumstances at the time of writing. In either of these cases the ambiguity may sometimes be removed by affixing to the words their meanings as determined by our rules; but, if this cannot be done, our rules fail and they do not enable us to ascertain the intentions of the author.

Patent ambiguity.

As an example of a patent ambiguity, suppose that a man writes in a letter, "I give my dog Ranger to my nephew John or Thomas." Here the writer has on the face of his letter expressed ambiguous intentions. He appears to be halting between two intentions. The ambiguity may disappear when we consider the circumstances of the writer at the time of writing. It might, for instance, appear that John or Thomas were two names by which the same person was known to him at that time. But if, on the other hand, it should appear that John and Thomas were

different persons, we should be unable to place any certain meaning on the words employed, or, in other words, we should be unable to ascertain the expressed intentions of the writer.

Latent ambiguity.

As an example of a latent ambiguity, suppose that the man had stated in his letter, "I give my dog Ranger to my nephew Robert." He has expressed an intention free from ambiguity on the face of the document. We find, however, when we come to investigate his circumstances at the time of writing, that he had two nephews, Robert Smith and Robert Jones. If we cannot discover further evidence as to his circumstances, our rule fails to remove the ambiguity, and we fail to discover the writer's expressed intentions. But suppose that, on further inquiry, we find that Jones had sailed for New Zealand many years before the date of the letter, that he had never been heard of again prior to that date, and that the writer of the letter had gone into mourning for him, though it had since been ascertained that he was living at that date. Suppose, further, that Robert Smith had, prior to and at the date of the letter, been on terms of intimacy with the writer, and had habitually been called "nephew Robert" by him, such evidence would be properly admissible under our rules to show that by the words "nephew Robert" the writer meant Robert Smith. But, according to the rules already laid down, we should not admit direct evidence of the writer's intentions to benefit Smith, such as declarations made by him at the time of writing his letter; for that would be to admit evidence of an unexpressed intention.

Exceptional case.

There is, however, a very important exception to the principle that we are not at liberty to adduce evidence as to the meaning that the writer affixed to his words in the particular document under consideration, as distinguished from the meaning that he generally affixed to them. This exception, which is sometimes called the rule as to equivocation, is the following:

Equivocation.

Rule V. Where there is an equivocation, that is, where

the person or thing intended is described in terms applicable indifferently to more than one person or thing, direct evidence of intention is admissible to prove which of them was intended. (*Lord Cheyney's Case*, 5 Rep. 68*a*; *Jones* v. *Newman*, 1 Wm. Bl. 60; Interp. Rule 25, p. 108.)

To consider the example given above: suppose that on inquiry it turned out that the writer had two nephews both called Robert, both living in London, and both on equal terms of intimacy with him: suppose, further, that the context does not show which of the two was intended; then our ordinary rules fail us, and we are allowed to adduce direct evidence of intention as to which of the two was meant. Such evidence might take the form of a parol declaration by the writer that he intended to give the dog to Robert Jones.

Sources of confusion.

It must be observed that much confusion has been introduced into the theory of interpretation from attention not having been paid to the fact that, when a latent ambiguity can be removed by the consideration of all the circumstances of the writer at the time of writing, the necessity for having recourse to the exceptional rule as to the admission of direct evidence of intention in cases of equivocation does not arise; and that, when a latent ambiguity cannot be removed by evidence admissible under the first four rules, and we admit direct evidence as to the writer's intentions, the case is, as already mentioned, exceptional; for we then admit extrinsic evidence to show that the writer affixed a special meaning to his words in the particular document under consideration.

Further source of confusion.

A further source of confusion arises from the fact that, as almost every word may bear more than one meaning, it is in a sense ambiguous; and the reader will find statements in text-books and even in judicial decisions that parol, by which is meant extrinsic, evidence is only admissible for the purpose of clearing up ambiguities. The true rules are, as above pointed out, that extrinsic evidence of circumstances is admissible for determining the primary meanings of the words employed, and direct evidence of intention to

determine, in the case of equivocation, which of the persons or things was intended, but only in that case.

Inaccuracies.

Sometimes the description of a person or thing given in a document does not apply accurately to any known person or thing, though it is partially applicable to two or more persons or things. This case must be carefully distinguished from that of a patent ambiguity with which it is sometimes confounded. The rules as to the interpretation of inaccurate descriptions are not adapted to any elementary treatise (*f*).

Interpretation is a tentative process.

The process of interpretation, as thus described, is a tentative process. When a document is placed in our hands, we at once obtain some information as to the time of writing from the character of the letters and the nature of the fabric on which it is written. But we can obtain no intrinsic evidence from the language employed till we have put some interpretation on it. In order to do so we must seek the primary meanings of the words employed in conformity with the rules above laid down, assuming, in the absence of extrinsic evidence, such circumstances and time of writing of the author as shall not be inconsistent with the intrinsic evidence already obtained. As soon as we have affixed meanings to the words, we are able to place some interpretation on the document; and, from the intrinsic evidence that we derive from its perusal, we are able to correct our opinions as to the circumstances and time of writing of the author, and are thus led to modify some of the meanings already affixed to the words; we are also led to modify them so as to endeavour to obtain a uniform and consistent sense from the whole document. If contradictions or ambiguities should now appear, we are thrown back on extrinsic evidence; but the very fact of reconciling contradictions and clearing up ambiguities may alter the intrinsic evidence and lead to some further modifications in the meanings which we affix to the words employed.

(*f*) See Interp. ch. viii. pp. 102 *et seq.*

Preconceived opinions

It is important to remember that, if we wish to interpret a document correctly, we must dismiss any preconceived opinions as to the intentions of the author; we must be on our guard against the grave error of substituting the intentions which in our opinion the author ought to have held for those which we find expressed in the document before us. For the author may have composed the document for the very purpose of showing that he did not hold certain opinions which he was generally, to his own knowledge, considered to hold. When the document relates to a subject in which we are deeply interested, the temptation to fall into this error becomes strong; and, if it relates to a subject which is not only one in which we are deeply interested, but is one which we habitually talk about, this temptation may become irresistible. "Some ideas," it has been said, "are by frequency and strength of association, so closely connected that they cannot be separated." A man who habitually expresses certain intentions in a definite form of words becomes at last unable to conceive the possibility of another man using that form to express any other intentions.

The student is recommended to consult Wigram on Extrinsic Evidence; and Interp. chapters i., iii., and iv. to viii.

## CHAPTER III.

### ON THE PREPARATION OF ASSURANCES.

Duty of draftsman to express intentions of the parties.

The duty of the draftsman is to express the intentions of the parties clearly and concisely in technical language. With a view to this object he should first form a clear idea of what those intentions are. It is, however, extremely difficult in some cases to discover what the parties wish, owing to the instructions being imperfect, obscure, or ambiguous; moreover, they may offend against some rule of law. In all these cases the draftsman must be guided by common sense and experience.

It is a convenient practice to put a note on the margin of those parts of the draft that are not strictly in accordance with the instructions, calling attention to the discrepancy. As an example: In most cases, where a lady takes the first life interest under a marriage settlement, it is intended that she should be restrained from anticipation, while in the instructions nothing may be said as to the restraint. In this case the draftsman may follow the instructions strictly, or he may (if he thinks that the words "without power of anticipation" have been omitted by error) add the restraint on anticipation; but he would be acting most improperly were he not to call attention to the fact. When the draft is finished, the instructions should be read over again, so as to ascertain that it is in accordance with them.

Do the instructions offend against any rule of law?

When the draftsman has satisfied himself that he clearly understands the intentions of the parties, he should, in the next place, consider whether these intentions offend against any rule of law. A testator may wish to tie up his property for a period that would infringe the rules against

perpetuities, or he may wish to make an inalienable provision for an extravagant son, in both of which cases his intentions would be contrary to law. In cases similar to these, where the instructions cannot be carried out owing to their offending against some rule of law, it becomes a subject for consideration whether the rule of law can be avoided, and, if not, how nearly the law allows the instructions to be carried out. For instance, in the second case mentioned, the provision may be made by means of a discretionary trust, an artifice the nature of which will be explained in the chapter on marriage settlements; while in the former case it would be a question for the draftsman whether he should settle the draft, departing from the instructions so far as may be necessary to make the provisions of the instrument in accordance with law, or should send back for fresh instructions. As a general rule, it is more convenient to prepare the draft in the manner which will, in all probability, be adopted, without waiting for further instructions, for, if this meets the client's wishes, time and expense will be saved.

When the draftsman has formed a clear idea as to what are the intentions of the parties, how far they are lawful, and, if unlawful, how they should be modified, he is in a position to prepare the draft. His duty now is to translate the intentions of the parties (modified, if necessary, so as not to be illegal) into technical language, arranged in the order commonly adopted for the purpose.

The draft should be sketched mentally.

He will facilitate his operations by sketching out the frame of his draft in his mind before he puts pen to paper. Before he does so, a perusal of precedents on similar subjects in any good collection will generally enable him to hit upon the most convenient scheme. There is another advantage in perusing printed precedents at this stage of the work, viz., that it lessens the risk of the omission of some clause which, though not mentioned in the instructions, should be inserted. For example, the instructions might be "To prepare a mortgage for £—— at £—— per cent. on the house, the title to which is shown in the accompanying

abstract." Nothing is said about covenants by the mortgagor for title, but the draftsman would, as a matter of course, insert words which imply them.

Skeleton draft.

As soon as the general frame of the draft has been determined, the draftsman may proceed to the actual preparation of it. A very good method is to frame a skeleton draft before he begins to draw, noting at what page in the book of precedents that he uses each clause will be found. Thus, suppose the ordinary case of a conveyance by a mortgagor and mortgagee to a purchaser. (See 1 K. & E. p. 451; Stud. Prec. p. 7.) The skeleton draft might run as follows:

Parties A. 1st—B. 2nd—C. 3rd.

Recitals.

1. Mortgage in fee for 1,000*l.* A. to B.
2. Contract for sale for 1,500*l.* A. to C.
3. Principal due, interest paid; principal to be paid off out of purchase-money; B. to join.

Witnessing clauses.

1. In consideration of 1,000*l.* to B.; and of 500*l.* to A., paid by C. Receipt.
2. A. "as beneficial owner," and B. "as mortgagee," grant to C. parcels.
3. Habendum "unto and to the use of" C. in fee simple free from the mortgage.

In such a simple case as that given for an example it would hardly be necessary for any one, except a mere beginner, to prepare a skeleton draft, but the practice is often in difficult cases of use even to a person of experience.

The draftsman should mark in the margin of each clause of the instructions, where they are complicated, the number of the corresponding clause of the skeleton draft, so as to guard against the accidental omission of anything intended to be provided for.

Begin each clause on a separate sheet.

It is a convenient practice in complicated cases to begin each clause on a separate sheet, to fold it up separately, and to endorse a reference to the skeleton draft.

These suggestions are of special value when part of the draft has to be prepared by pupils or clerks. For when the skeleton draft has been carefully framed, it is unlikely that pupils of even small experience will adopt the wrong common forms when they draw the clauses; and if they should, the fact of each clause beginning on a separate sheet would facilitate the substitution of the appropriate clause.

Alterations in draft.

If the skeleton draft has been carefully framed, it is unlikely that the frame of the draft will require much alteration; but if it should, the clauses already prepared should be resettled with the greatest care; for it is evident that a slight change in one part of the draft may alter the meanings of the words in another part, or even render them unintelligible.

For example, suppose that, as the draft originally stood, there were four witnessing parts, which, by a subsequent alteration, were reduced to three; there would be a considerable risk of retaining a reference to "the hereditaments and premises fourthly hereinbefore conveyed." Or again, suppose that the parcels or incumbrances were described in several schedules referred to in the body of the deed by numbers; there would be considerable risk, if on resettling the draft the numbers of the schedules were altered, of omitting to make corresponding alterations in the body of the deed.

Where there is more than one party to a deed, the practice of the profession determines whose solicitor is to prepare the draft conveyance to be submitted to the solicitor of the other parties. It is the duty of the solicitor of a purchaser, mortgagee, or lessor to prepare the draft and to submit it for approval to the solicitor of the vendor, mortgagor, or lessee. The latter solicitor, and the counsel, if any, whom he instructs to settle and approve of the draft, must remember that it is no part of his duty to give lessons in conveyancing to the practitioner whose draft he has to settle; the only alterations that he is entitled to make in

the draft are such as will render it certain that his client conveys the property that he has undertaken to convey, and nothing more, and that he only takes upon himself the obligations that he is bound either by express contract or by law to take upon himself. If he makes any alterations it is usual and convenient to state in the margin the reason for making them, as if this is not done and the reason is not evident, a correspondence between the solicitors as to the propriety of the alterations may take place, thus causing delay and consequent expense. While it can hardly be said that stating reasons for alterations is absolutely incumbent on the draftsman, no sensible practitioner in either branch of the profession habitually omits to state them. The only exception to the rules above laid down as to alterations is where a solicitor sends a draft drawn by himself to counsel to settle on behalf of his (the solicitor's) client, as the approval in the usual form of the draft signed by counsel (*post*, p. 45) is a sufficient guarantee that in his opinion the alterations are proper for the purpose of carrying out his instructions. But even in this case it will generally be found convenient to give the reasons for the alterations.

Drawing at random.

It is hardly necessary to point out the impropriety of inserting or omitting anything without having a reason for it. The unnecessary insertion of a clause is likely to give a great deal of unnecessary trouble to any one perusing the draft; he will assume that there was some reason for the insertion, and will vainly try to discover what that reason was. On the other hand, the improper omission of a clause may either render the draft unintelligible, or may prevent it from having the desired operation.

Suppose, for instance, that the draft is a conveyance under an express power of sale contained in a strict settlement on A. for life, with remainders in tail to his sons and daughters in the usual manner, with remainder to B. for life, with remainders over; the power to be exercised by the trustees with the consent of the tenant for life for the time being;

and that A. (the first tenant for life) having died without issue, B. (the second tenant for life) is in possession. In this case what we really want to show is that the power can now be exercised by persons who are parties to the conveyance, *i.e.*, by the trustees and present tenant for life. Our recitals, therefore, should set forth the limitations of the settlement so far as, and including, the limitations to B., and the power of sale; and should be continued by stating the death of A., without issue. It would be unnecessary to set out any limitations subsequent to that of the life estate to B., for the knowledge of such limitations would be useless to any one perusing the deed. Generally, indeed, they are shortly noticed as follows: "With divers remainders over."

Suppose, on the other hand, the draftsman were to omit the recital of the death of the first tenant for life, the draft would be most incorrectly framed, as on the face of it it would appear that the necessary consent had not been obtained.

Draft not to be written too closely.

The young draftsman is warned against writing on both sides of the paper or placing his lines too close together, for if he does so, he will have great difficulty in making any alterations which may become necessary. This is of special importance when the draft has to be settled by another person. The author was acquainted with a counsel of eminence, who, if a draft too closely written was sent to him to be settled, had it re-copied on wide lines before he touched it. The practice is to put about two folios (*i.e.*, 144 words) on a page. Should the draftsman have to resettle a draft prepared by some one else, he will find it convenient to make his alterations in pencil in the first instance, and afterwards to write them in coloured ink, so as to show that the person who prepared the draft is not responsible for them.

Common errors of unskilful draftsmen.

Unnecessary statements are constantly made by careless or unskilful draftsmen; the most common instances are the following:

*First.* They state conclusions of law. This is unneces-

sary, for we presume that any one perusing the draft will know what the law is. But a departure from this rule is occasionally allowable; for example, it sometimes greatly conduces to clearness if the net result of a long series of recitals is stated shortly.

In the following examples unnecessary words are printed in *italics;* the student is advised to discover for himself why they are unnecessary:

"A. B. died, leaving C. D., his only son *and heir-at-law.*"

"The said sum of £—— [*a mortgage debt*] was not paid on the day appointed for the day of payment thereof, *whereby the estate of the said* [*mortgagee*] *became absolute at law, but redeemable in equity.*"

*Second.* They state conclusions as to facts. This statement may be either in a positive or negative form. As for instance stating that

"A. B. died, leaving C. D. his heir-at-law, *him surviving;*" or stating that persons took "as tenants in common *and not as joint tenants.*"

*Third.* They deny that facts happened. It is obvious that, as a general rule, a negative statement is unnecessary, for we always presume that when a certain state of things is mentioned as existing, it remains the same unless some change is mentioned.

A negative event should, as a general rule, only be stated where the non-existence of a particular event is important for our purpose. Thus in the example (*ante*, p. 41) it is necessary to state that the first tenant for life died without issue, because, if there were issue alive, B. would not be tenant for life, and therefore his consent would not be necessary to the exercise of the power.

In some few cases it is the practice to state a negative; as for example if we recite a will, we recite that the testator died without having revoked or altered it; and where there is a power of appointment to be exercised in favour of children, we sometimes deny that there has been any prior exercise of the power.

Book of precedents can be used as exercise book.

The student who desires to become a good draftsman may turn any good book of precedents into an exercise book in the following manner: Let him make a careful analysis of a precedent, so as in fact to form the skeleton draft from which it might have been prepared. In a short time, when he has forgotten the actual wording of the draft, let him try to reproduce it from the skeleton draft and a book of common forms. Let him not be discouraged if his early attempts are failures, for nothing but practice can make an expert draftsman.

When he can reproduce the precedents with tolerable facility from the skeleton draft, let him frame the instructions on which, in his opinion, the skeleton draft might have been founded, and endeavour to reproduce the precedent from the instructions only. Two students working together might greatly improve on this method, one framing the skeleton draft, the other reproducing the precedent, as in this case no assistance would be given by memory.

Another excellent plan is to take some particular clause, the express power of sale formerly inserted in a mortgage deed for instance, and, having made a careful analysis of the variations in form that occur in the different precedents, to endeavour to discover the reason for them.

Indorse title.

After the draft has had a back (or blank sheet) added to it, and has been tied and the pages have been numbered, the draftsman indorses a short title on the back, thus:

"Mr. A. B. and his mortgagees
to
Mr. C. D.
Draft Conveyance of the Sutton Marsh Estate."

"Draft appointment by A. B. and C. his wife, in exercise of a power contained in their marriage settlement, of 10,000*l.* consols to Miss D. B. on her marriage with Mr. E. F."

Approval.

And, finally, he states his approval of the draft in some such form as the following:

"I have settled and do approve of this draft on behalf of Mr. ——, subject to my notes in the margin."

"I have resettled and do approve of this draft on behalf of Mr. ——, subject to my notes in the margin."

"I have resettled and do approve of this draft on behalf of the parties of the first and third parts in accordance with the instructions of the —— day of ——, 189—, and subject to my opinion in fold."

He signs the approval, adding the date.

The first two forms are those used when the draft is sent to the opposite party.

Owing to the risk of oral instructions being misunderstood, it is a convenient practice in settling a draft from oral instructions to call special attention to the fact, as follows:

"I have resettled and do approve of this draft on behalf of all parties, in accordance with the oral instructions given to me by Mr. —— in conference on the —— day of ——."

## CHAPTER IV.

### DEEDS (*a*).

Deed defined.

It is not very easy to define a deed. Coke states the requisites of a deed to be, "first, writing; secondly, in parchment or paper; thirdly, a person able to contract; fourthly, by a sufficient name; fifthly, a person able to be contracted with; sixthly, by a sufficient name; seventhly, a thing to be contracted for; eighthly, apt words required by law; ninthly, sealing; and tenthly, delivery." (Co. Lit. 35 *b.*) Again, he says, "a deed signifieth in the common law an instrument consisting of three things, viz., writing, sealing, and delivery, comprehending a bargain between party and party." (Co. Lit. 171 *b.*) An interesting discussion as to what amounts to a deed will be found in *Reg.* v. *Morton*, L. R. 2 C. C. R. 22, where Bovill, C.J., says, "In some of the definitions given a deed is described as being something of the nature of a contract. But the term is clearly not confined to contracts. A charter of feoffment, for instance, is a deed: so is a gift or grant, a power of attorney, a release, or a disclaimer. I would go further, and say that any instrument delivered as a deed, and which either itself passes an interest or property, or is in affirmance or confirmation of something whereby an interest or property passes, is a deed. . . . Many documents under seal are not deeds, for instance, an award, though sealed" (*b*).

(*a*) As to the form and execution of deeds, see Articles in 30 Sol. J., pp. 636, 651, 667.

(*b*) Or a magistrate's warrant; per Parke, B., *Chanter* v. *Johnson*, 14 M. & W. 408. See further as to deeds generally, Cruise's Digest, vol. iv., Title xxxii., *Deed*, ch. i. ss. 16 *et seq.*; *ib.* ch. ii.; and Shep. Touch. 50.

The authorities appear to be agreed that a deed must be written on parchment or paper, sealed, and delivered.

Seal or mark used in old times.

In old times very few people could write, and accordingly most people, when they wished to signify their assent to any document, either put their mark to it in the form of a cross, as now done by the illiterate, or affixed a seal to it. The former plan appears to have been a practice among the Saxons, the latter among the Normans; and as, after the Conquest, the judges were Normans, they introduced the latter practice, *i.e.*, that of using a seal, into this country (*c*). As, in old times, writing was used only for matters of importance, the fact of sealing a document remained, even after the art of writing had become common, an indication that the document was of importance. And, accordingly, to this day, a document under seal is considered in law of greater importance than one not under seal.

The reader need hardly be reminded that it is necessary that the seal should have been affixed with the intention that the document should operate as a deed; that a seal affixed merely for the purpose of keeping the document secret, as in the case of a letter going through the post, will not render it a deed contrary to the wish of the person sealing it. In old times every man had his own distinctive seal, but in practice at present the seals are affixed by the law stationer, and only touched by the parties. Sometimes, indeed, in the case of a marriage settlement, some of the parties to the deed have a fancy for sealing it with their own seals. The solicitor witnessing the execution of such a deed will see that those people who use their own seals put them in the proper place, which, where the deed consists of more than one skin of parchment or sheet of paper, is on the strings that tie the different skins of parchment or sheets of paper together. The reason of this place being adopted for the seal appears to be the belief that it throws difficulty in the way of a fraudulent substitution of one skin for another.

See Kemble, Cod. Diplom., I. pp. 90 *et seq.*; Pollock, Land Laws, p. 75.

To constitute a seal neither wax, wafer, nor probably even an impression is requisite; merely touching the parchment with the seal or the end of a ruler is sufficient (*d*).

What amounts to delivery.

There is no need to make use of any particular form in the delivery (Co. Lit. 36 *a*, 49 *b*; *Smith* v. *Adkins*, L. R. 14 Eq. 402; Shep. Touch. 57, 58). The usual custom is to touch the seal and say, "I deliver this as my act and deed." But any word or sign showing an intention to deliver the instrument will do. Thus actual physical delivery (handing over) to one of the parties or his solicitor is sufficient; or saying to him "take this," "this will serve," or the like, will suffice (*e*). Merely throwing the deed on the table would not be a delivery, as the act would be equivocal; but throwing it on the table towards the other party, or allowing him to take it up, would clearly show the intention. In practice it often happens that a man delivers the deed in the presence of his own solicitor only, and possibly retains it in his own possession. The question whether this is intended to operate as an absolute delivery, or as a delivery to take effect on the performance of a condition, is entirely a matter of fact to be ascertained from all the surrounding circumstances (*f*).

Escrow.

When the deed is delivered to some person *not* a party to it (Co. Lit. 36 *a*) (*g*), to take effect in certain events, it is called an escrow. (Shep. Touch. 58) (*h*). The modern cases show that a deed may be an escrow although it was not expressly stated at the time of the delivery that the delivery was conditional (*i*), or although it was delivered to

(*d*) Per Bovill, C.J., *Re Sandilands*, L. R. 6 C. P. 411; Sugden on Powers, 232. See *Re Balkis Consolidated Co.*, 36 W. R. 392; *National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1.

(*e*) *Xenos* v. *Wickham*, L. R. 2 H. L. 296, at p. 312.

(*f*) *Bowker* v. *Burdekin*, 11 M. & W. 128; *Xenos* v. *Wickham*, L. R. 2 H. L. 296; *Watkins* v. *Nash*, L. R. 20 Eq. 262.

(*g*) *Whiddon's Case*, Noy. 6, Noy. 50.

(*h*) *Watkins* v. *Nash*, L. R. 20 Eq. 262; *Nash* v. *Flyn*, 1 J. & Lat. 162, 175; *Kidner* v. *Keith*, 15 C. B. (N.S.) 35, 43; *Millership* v. *Brookes*, 5 H. & N. 797.

(*i*) *Murray* v. *Stair*, 2 B. & C. 82.

the solicitor of the grantee (*k*), or to one of several grantees, provided that the intention that the delivery was conditional appears clearly. An example of a deed delivered as an escrow is where a person executes and delivers a deed to his solicitor to be exchanged against the purchase-money when paid by a purchaser, or against the counterpart of a lease when executed by the lessee. "It would be monstrous," says Romilly, M.R. (*Walker* v. *Ware, &c., Railway Co.*, 35 Beav. 58), "for the purchaser to be allowed to say to the seller, 'You have executed the deed, and therefore I need not pay the purchase-money; and I have got the legal estate, and you must enforce payment of the purchase-money as best you can.'" His Honour was of opinion that in such a case the legal estate did not pass till the deed was handed over. In practice it would be a wise precaution for the solicitor, in cases where there is any serious doubt as to the ability of the purchaser, or as to the honesty of the intended lessee, to make his client deliver the deed as an escrow, to take effect as a deed upon the money being paid or the counterpart being delivered up; for Williams, J. (in *Kidner* v. *Keith*, 15 C. B. N. S. 40), says, "in the ordinary case of a deed executed, and left with the party's attorney, unless it is delivered to the attorney as an escrow not to be delivered until the consideration money is paid, or some other condition performed, it operates as a perfect deed."

Execution.

A purchaser cannot insist on the vendor executing, *i.e.*, sealing and delivering the conveyance in the presence of himself or his own solicitor; but if such a request be made, the vendor will act wisely in acceding to it, as the purchaser is entitled to have the execution attested by a person appointed by him, who may be his solicitor (C. A. 1881, s. 8; as to the law before 1882, see *Viney* v. *Chaplin*, 2 De G. & J. 468; *Essex* v. *Daniell*, L. R. 10 C. P. 538).

Attestation.

Although at common law the attestation of a deed is

(*k*) *Watkins* v. *Nash*, L. R. 20 Eq. 262; *London Freehold, etc., Property Co.* v. *Suffield* [1897], 2 Ch. 608.

not necessary (*l*) to its validity (Co. Lit. 7 *a*; *Garrett* v. *Lister*, 1 Lev. 25), in practice a deed is executed in the presence of one or more witnesses who attest it (as to the statutes requiring special attention, see Taylor on Evidence, sect. 1,110). The witness should add his "addition," *i.e.*, his address and description, so that he can readily be traced if it should become necessary to prove the fact of execution.

Power. If a deed is made in exercise of a power, the terms of which require special formalities in the execution of the deed, the deed may be executed either with the prescribed formalities, or in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested, notwithstanding that special formalities were required by the terms of the power (the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 12).

Erasure. An erasure or interlineation in any document should be initialled immediately before the execution by the parties and witnesses (*m*). Erasures should always be made in ink by drawing a line through the words intended to be omitted, so as to leave such words legible, and should not be made with a penknife or with an ink-eraser. If an alteration is

(*l*) The case of a will is different, owing to the positive enactment of the ninth section of the Wills Act, which declares "that no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned: (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." The only safe method of executing a will is for the testator and the intended witnesses to be assembled before the testator begins to sign his name, and for the witnesses to subscribe immediately after him, without anyone leaving the room.

(*m*) Alterations or interlineations in a deed are presumed, in the absence of evidence to the contrary, to have been made prior to execution; Interp. ch. ii. pp. 17 *et seq.*

made in the former way, a person examining the document can see for himself what alteration has been made and how often the document has been altered. If an alteration has been made in either of the latter ways, this is not the case. A person perusing an abstract in which an erasure made in either of the latter ways appears, should call attention to the fact.

Deeds are divided into indentures and deeds poll (4 Cruise, Dig., p. 8; Shep. Touch. 50; Co. Lit. 229 *a*).

Indenture.

By an indenture was originally meant a deed having the top of the paper or parchment cut and indented. In old times when the deed was in two parts, they were both written on the same skin, which was afterwards cut through in a wavy manner; and generally before the parts were cut asunder, a word was written along the line of division in such a manner that it was cut through, so that afterwards it could be seen that the two parts were what they professed to be by their fitting into each other. These two parts were called "counterparts" or "counterpanes," and when put together constituted the contract by deed. Now counterparts are not written on the same skin, and in practice the part executed by the person from whom the estate moves is called "the original," and the part executed by the person accepting the estate is called "the counterpart." When both parts are executed by all parties, they are called "duplicate originals" (2 Man. & Gr. 518, n. (*b*)). Gradually the custom of indenting a deed has died out; and now, by "an indenture" we only mean a deed that has parties of more than one part, an expression which will be explained hereafter. The effect of "The Real Property Act, 1845" (8 & 9 Vict. c. 106, s. 5) is to render it unnecessary for a deed purporting to be an indenture to be actually indented. For some time before this Act was passed the rule as to an indenture being actually indented had been disregarded. Some Judge, on its being argued that a so-called indenture could not take effect because it was not actually indented, asked to see the deed, took it, and looked

along the top. He found, he said, that the top was not a mathematically straight line; he therefore determined that it was an indenture.

Deeds poll. Deeds poll are so called because they were formerly *polled* or cut even at the head. The term is now applied to deeds where the persons executing are all of one part. The greater part of deeds poll are powers of attorney or deeds exercising powers in a settlement or will, as, for instance, a deed appointing a portion (see a form in Stud. Prec. p. 102).

Date. It is the invariable practice to put a date to a deed. In indentures the date is placed at the beginning, in deeds poll at the end, in the testimonium clause. As, however, "deeds, in point of obligatory force with a view to priority of title, take effect from, and therefore have relation to, the time, not of their date but of their delivery" (Shep. Touch. 72), it follows that if the date be impossible (Co. Lit. 46 *b*), or be omitted, or if the date stated in the deed be different from that of the time of delivery (*Goddard's Case*, 2 Rep. 4 *b*), the deed takes effect from the latter time (*n*).

Parties. As a matter of convenience, the name of every person whose intentions are expressed by any instrument should be formally stated. When all the persons have identical intentions, they generally express them by means of a deed poll; but when this is not the case, they do so by means of an indenture, and are said to be made parties to it; those who have identical intentions being made parties of the same part. The phrase "identical intentions" requires a little explanation. In a common contract for sale from A. to B., although at first sight it may appear that the intentions of A. and B. are the same, yet this is not really the case; for A.'s intention is to part with his property and receive money, while B. desires to part with his money and receive

(*n*) See Interp. ch. ix. pp. 119 *et seq.*; and as to the presumption that deeds of the same date were executed in the order which will effectuate the purpose of the parties, *ibid.* p. 7, citing *Gartside* v. *Silkstone, &c., Co.*, 21 Ch. D. 762, and other cases.

property. Their intentions are different; and accordingly, in the deed declaring their intentions, they would be made parties of different parts; while, on the other hand, if the sale were made to two persons, B. and C., as trustees, for instance, they would have identical intentions differing from those of A.: so that A. would be of one part, B. and C. of the other.

The date and names of the parties are stated at the beginning of an indenture in the following form:—

"This Indenture, made the —— day of ——, 19 ——, between A. B. of ——, Esq., of the first part; C. D. of ——, Esq., and E. F. of ——, Gent., of the second part; and K. L. of ——, Esq., of the third part."

The parties are expressed to be of as many parts as are necessary, the parties of the last part being introduced by the word "and." If the parties be of two parts only, they are said to be "of the one part" and "of the other part."

Formerly no person could take an immediate estate under an indenture unless he was named as one of the parties to it (Co. Lit. 231 *a*); but he could take a remainder (*ibid.*), or a use (*Sammes's Case*, 13 Rep. 55), and therefore the benefit of a trust, without being named as a party. But by the Real Property Act, 1845 (8 & 9 Vict. c. 106, s. 5), under an indenture executed after the 1st Oct. 1845, an immediate estate or interest in any *hereditaments* and the benefit of a condition or covenant respecting any *hereditaments* may be taken, although the taker thereof be not named a party to the indenture. This is, however, one of the many cases in which a change in the rule of law does not alter the rule of practice. It is still a rule of practice to make every person a party who takes an immediate estate or interest in hereditaments, or the benefit of any condition or covenant respecting them; but the latter branch of the rule is subject to some exceptions. It is to be noted that the Act relates only to "hereditaments."

The formal method of stating the parties to a deed poll varies according as it does or does not contain recitals; in

the former case it begins, "To all to whom these presents shall come, A. B., of, etc., sendeth greeting"; in the latter case it begins, "Know all men by these presents that I, A. B., of, etc.," the date being in each case mentioned in the testimonium clause.

In contracts not under seal the form is immaterial, but when they are prepared in a formal manner, the commencement is generally the same as that of an indenture, substituting the words "Memorandum of agreement," or "Articles of agreement" for "This indenture." Where the contract is long, and is, according to a usual and convenient practice in such cases, divided into numbered paragraphs, the heading "articles of agreement" is more often used than "memorandum of agreement," but the difference is entirely immaterial.

Additions. The parties to a deed are always described by their names and "additions," that is, their dwelling-places and qualities or descriptions. There is no strict rule as to the minuteness of description necessary; all that is required is to describe the parties with such a degree of accuracy that no confusion will arise (*o*). Generally, if a person lives in the country, a description, as "of the parish of ——, in the county of ——," is sufficient. On the other hand, you generally state the street and number in the street of any one living in a town, *e.g.*, "of No. 118, John Street, in the parish of St. Mary, in the city of London." When a party to the deed was party to a former deed which related to the same property, but in which he was described differently, we generally give both the present and the former description, thus:—

"John Smith, of No. 118, John Street, in the parish of St. Mary, in the city of London, but formerly of the parish of Tonbridge, in the county of Kent."

The quality of each party is stated after his dwelling-place with a reasonable degree of accuracy, but subject to the usual exception that a gentleman is generally called

(*o*) See Interp. 125 *et seq.*

an Esquire (*p*) whether he be so strictly speaking or not. Examples—Sir John Dacres, of Dacre Hall, in the county of Middlesex, Baronet; William Lumley, of 152, Suffolk Street, in the city of Westminster, Esquire.

Peers.

In the case of a peer, peeress, or person holding a title by courtesy, the dwelling-place is usually omitted. A peer is described by the proper prefix according to his rank; "the most noble" in the case of a duke; "the most honourable" in that of a marquis; "the right honourable" in that of any other peer; followed by his Christian name and title, thus: "The Most Noble Arthur, Duke of Wellington."

Courtesy titles.

The phrase "courtesy title" appears to require some explanation. The eldest son of a duke, marquis, or earl, is entitled by the courtesy of England to assume such one of his father's inferior titles as he thinks fit, while the younger sons of dukes and marquises, and the daughters of dukes, marquises, and earls, are entitled by the courtesy to prefix the title Lord or Lady to their names. There appears to be some difference of usage in the method of describing persons who bear courtesy titles. In all cases they are described both by their true description and by their courtesy title. Bearing in mind that every child of a peer is entitled to the prefix "honourable," and that the usage of conveyancers is to prefix the words "right honourable" to every person bearing a title by courtesy, the better plan appears to be to describe the person as "the right honourable," giving both Christian and surname, adding "commonly called," and his title. Thus, Lord Edgar Algernon Robert Cecil being a younger son of a marquis, and Earl Percy being the eldest son of a duke, they would be described as follows: "The Right Honourable Edgar Algernon Robert Cecil, commonly called Lord Edgar Algernon Robert Cecil," "The Right Honourable Henry Algernon George Percy, commonly called Earl Percy;" but some conveyancers describe persons having courtesy titles exactly in the same manner as they

(*p*) As to the meaning of "Esquire," see 1 Byth. by Rob. 793, note.

describe persons who are allowed by the usage of society to assume titles to which they have no legal right.

Titles assumed without any strict right.

This usage authorises the assumption by the children of a person who bears the courtesy title of a peer of the same titles as if their father had actually been a peer. But in this case they are not, strictly speaking, honourables, and it appears the better course to describe them first as if they had no title, followed by the title with the prefix right honourable. Thus the eldest son of the late Earl Grosvenor, being the grandson of a duke, would be described as "Hugh Richard Arthur Grosvenor, Esq., commonly called the Right Honourable Viscount Belgrave." Similarly the usage of society authorises a commoner who marries a peer, and after his death marries a commoner (*q*), to retain the title that she acquired by her first marriage. Thus the widow of the sixth Duke of Manchester married Sir Stevenson Arthur Blackwood, K.C.B., and her proper description would be "Harriet Sydney, the widow of the late Sir Stevenson Arthur Blackwood, K.C.B., commonly called the Most Noble the Duchess of Manchester."

Privy councillors.

Privy Councillors are entitled to the prefix "right honourable." Example—"The Right Honourable Arthur James Balfour, of Whittinghame, in the county of Haddington, N.B."

The wife of a baronet or knight is described by "Dame" prefixed to her Christian and surnames; example—Dame Alice Smith. If she marries again after the death of her husband, she retains her title unless her second marriage confers a higher title on her.

Sometimes tedious genealogical recitals can be avoided by affixing a statement of relationship in the description of the parties, but this method is not to be recommended.

Divorced woman.

Change of name.

When a woman who has been divorced, either on her own petition or on that of her husband, is a party, there is occasionally some difficulty in describing her. It should be remembered that, while a Christian name cannot be altered,

(*q*) *The Duchess of Suffolk's Case*, 4 Leon. 196; Dy. 79; Ow. 81.

except possibly at confirmation (Co. Lit. 3 *a*), a surname can be altered or assumed at the pleasure of the party (*Doe* d. *Luscombe* v. *Yates*, 5 Barn. & Ald. 544; *Du Boulay* v. *Du Boulay*, L. R. 2 P. C. 430), so that the surname is a name of reputation only; and accordingly a woman who has been divorced is correctly described after the divorce by the surname that she bore immediately before it, *i.e.*, by her husband's name. The husband cannot, as is sometimes erroneously believed, insist on her resuming her maiden name; and if she resumes her maiden name, it may be some time before she re-acquires it as a name by reputation (*Fendall* v. *Goldsmid*, 2 P. D. 263). It appears therefore proper, if she wishes to resume her maiden name, and is made a party to a deed shortly after the divorce, to describe her by both surnames, thus—"A. B. lately A. C." If there is any reason for showing that she was formerly a married woman, she may be described as "late the wife of D. C.;" but in most cases this will not be necessary. She may be described by her business; or, if she has none, as "landed proprietor," "fundholder," or the like.

Parties by interpretation.

Occasionally, particularly in commercial and railway conveyancing, we annex to the description of each party the character in which he acts, and afterwards call him by that name throughout the instrument. Thus in a conveyance by a vendor, his trustees, and mortgagees, to a railway company, the parties might run as follows:—

"This indenture made, &c., between A. B., of ——, Esq. (hereinafter called 'the vendor'), of the first part; C. D., of ——, Esq., and E. F., of ——, Esq. (hereinafter called 'the mortgagees'), of the second part; G. H., of ——, Esq., and K. L., of ——, Esq. (hereinafter called 'the trustees'), of the third part; and the North and South Junction Railway Company (hereinafter called 'the Company'), of the fourth part."

Then, wherever in the deed we should, if we had not adopted this plan, have used the names of the mortgagees, C. D. and E. F., we should simply say, "the mortgagees;" and so as to the other parties.

Nothing but practice will enable the student to determine when this plan is likely to be of use.

Order of parties.

The order in which the parties are arranged is very much a matter of practice, and will best be learnt by carefully studying all the properly drawn deeds to which the student can gain access. Usually in a conveyance the conveying parties come before those to whom the interest is conveyed; the persons having the legal estate, whether owners, trustees, or mortgagees, come first; they are followed by incumbrancers, such as second mortgagees, annuitants; the person entitled to the beneficial interest subject to the charges, coming after his incumbrancers; the persons to whom the conveyance is made coming after those who convey; trustees, inserted for the interest of the persons to whom the conveyance is made, generally come last of all.

Thus, in the case of a conveyance by mortgagor and first and second mortgagee, according to the rule the order is :—

1st, First mortgagee; 2nd, second mortgagee; 3rd, vendor; 4th, purchaser.

Here the first mortgagee comes first as having the legal estate, and the vendor comes last of the conveying parties. But in this case many practitioners make the vendor the party of the first part (this latter plan is adopted throughout K. & E.). Thus in the case of a conveyance to a purchaser keeping alive an incumbrance paid off as a protection against concealed incumbrances the order is, 1st, Mortgagor; 2nd, mortgagee; 3rd, purchaser; 4th, trustee for purchaser (see 1 K. & E. p. 457).

Endorsed deed.

Where a deed is endorsed on another deed, any person who is a party to or is mentioned in the endorsed deed, and is also a party to or is mentioned in the deed on which it is endorsed, is described in the first place where his name is mentioned in the endorsed deed as "the within-named A. B." and afterwards as the "said A. B." The principal deed will be referred to in the first place where it occurs as the "within written" indenture or deed poll, as the case may be, and afterwards as the "said" indenture

or deed poll. If more than one deed is endorsed on the same deed, a person who is a party to or is mentioned in a subsequently endorsed deed and is also a party to or mentioned in one of the earlier endorsed deeds, is described as "the above-named A. B." If reference is to be made to a prior endorsed deed, it will in the first place where it occurs be to the "above written" indenture or deed poll.

Supplemental deeds.

The C. A., 1881, s. 53, provides that "A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof."

Considerable brevity can be obtained by adopting these provisions. The recital may be "Whereas these presents are supplemental to an indenture, dated &c., hereinafter referred to as the principal indenture" [*or, if there are several principal indentures*, "the first principal indenture," *or* "the mortgage of 1897," *or as the case may be*] "whereby the hereditaments hereby assured were conveyed to the said Z. in fee simple by way of mortgage to secure the payment of the principal sum of £—— and interest to the said Z. by the said X." (See for other forms 1 K. & E. p. 373, and note, p. 617.) Where all the principal indentures are handed over to the person who takes under the supplemental deed, no difficulty is likely to arise owing to the recital not being sufficiently full, as in case of doubt he will be able to refer to them, but if that is not the case it is often advantageous to insert full recitals, owing to the delay and expense which may be incurred if it should become necessary to inspect deeds in the custody of a stranger.

Recitals (*r*).

The framing of recitals is sometimes a very difficult task. They should be as concise as is compatible with their being intelligible and accurate. It need hardly be stated that accuracy is of paramount importance, having regard to the provisions of the V. & P. A. 1874 (37 & 38 Vict. c. 78),

(*r*) See Interp. ch. x., "Recitals."

and to the doctrine of estoppel. The V. & P. A. 1874 (s. 2) provides that, on a contract for a sale of land, recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless proved to be inaccurate, be taken to be sufficient evidence of the truth of the matters stated. See *Bolton* v. *London School Board*, 7 Ch. D. 766.

Estoppel.

Coke gives the following definition of estoppel: "It is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth" (Co. Lit. 352 *a*) (*s*).

The doctrine rests partly on the duty of every man to speak the truth, and partly on the policy of the law, which will not allow a man to make a solemn statement on the faith of which he knows that another will act, and then to deny the truth of his statement. Every recital in a deed must be taken as a solemn statement, on which some of the parties are intended to act. Thus, for instance, in a common purchase deed, a recital that the vendor is seised in fee must be taken as his statement on which he intends the purchaser to act. And it would operate as monstrous injustice for the vendor afterwards to be allowed to allege that he was not seised in fee at the date of the deed, but that he had since become so, and to allow him to recover the land by his new title. Thus, if he alleged that the land did not belong to him at the time when he professed to sell it, and that he had since bought it from the true owner, the purchaser from him would in an action of ejectment produce the deed, and although the vendor's present story might be quite true, he would be *estopped*, *i.e.*, *stopped*, *prevented*, from setting up any title incompatible with that which he had solemnly asserted. But such a recital is no estoppel in an action which is not founded on the deed itself, but in which the question of the vendor's title incidentally comes in question, whether the action

(*s*) See Shelford, R. P. Stat. 258, on Estoppel.

be between the parties to the deed, or between the vendor and a stranger. (*Carpenter* v. *Buller*, 8 M. & W. 209; *Ex parte Morgan*, 2 Ch. D. 72; Interp. p. 141.)

In order that a recital may operate by estoppel it must be clear and unambiguous (*t*): for instance, a recital that a vendor "is seised or otherwise well entitled to" the property does not estop a person claiming under the vendor from denying that he had the legal estate; for it will be observed that the recital only amounts to a statement that he had an estate either at law or at equity. (*Heath* v. *Crealock*, L. R. 10 Ch. 22; *General Finance, &c., Co.* v. *Liberator, &c., Society*, 10 Ch. D. 15.)

Recitals.

Many students fall into the error of thinking that there is but one form of reciting a particular deed. This is not so; the form of the recital depends upon the nature and object of the deed in which it is contained. Compare the recitals of a mortgage in a conveyance by the mortgagor and mortgagee (Stud. Prec. 7), in a conveyance by the mortgagee under his power of sale (Stud. Prec. 9), and in a transfer of the mortgage (Stud. Prec. 68).

A recital is not a necessary part of a deed; and if there is a discrepancy between the recitals and the operative clauses, and the latter are clear and unambiguous, the recitals will not control them (*u*). For instance, if a purchase deed contains a recital of a contract for sale free from incumbrances, and a covenant for title framed in the usual form, or the vendor conveys "as beneficial owner" so as to imply the statutory covenants (see the C. A. 1881, s. 7, *post*, p. 105), in either of which cases the vendor covenants only against the acts of himself, his ancestors and testators, that is, persons through whom he derives title otherwise than by

(*t*) By which is meant not that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed; per Bowen, L.J., *Low* v. *Bouverie* (1891), 3 Ch. at p. 106; and per Kay, L.J., *ibid.* 113.

(*u*) Interp. 129, Rule 36.

purchase for value (*x*), the generality of the recital will not operate so as to enlarge the covenant, and render it a covenant against all incumbrances. On the other hand, if the operative clauses be obscure or ambiguous, they may be explained by the recitals (*y*).

Recitals generally in chronological order.

In most cases it is convenient to arrange the recitals in chronological order. The exceptions may be ranged under the following heads:—

1st. Where the deed has reference to more than one distinct property: in which case it is convenient to trace the dealings with each property separately down to the time when all the properties were first dealt with together. Thus, in a deed of exchange, the dealings with the two properties should be kept entirely distinct.

2nd. Where the deed deals with several estates or interests in the same property, which estates or interests have always been dealt with separately. Thus, where a term has always been kept distinct from the fee, and they are dealt with in the same conveyance, the recitals respecting them may very conveniently be kept distinct.

Two classes of recitals. Narrative.

Recitals are divided into *narrative* recitals, which are either general or particular, and *introductory* recitals (*z*).

The narrative recitals are so framed as to show the nature of the interest intended to be dealt with. If the person who conveys the property is seised in fee, they commence with the recital of his seisin, or with the deed by which the property was conveyed to him; or, if he be a copyholder seised of a customary estate of inheritance, they commence with his admission. In other cases they generally commence with the creation of his interest, and trace all the dealings with it down to the time of the execution of the deed in preparation. If the first of them be a deed, it is unnecessary, as a general rule, to show why

(*x*) See *David* v. *Sabin* (1893), 1 Ch. 523 at p. 532; Interp. 473.

(*y*) Interp. 132, Rule 37.

(*z*) See for examples Stud. Prec. 5, and 1 K. & E. pp. 356 *et seq.*, and further as to recitals, *post*, p. 85.

or by whom the interest was created, and the recital is called a *general* recital.

*Example.*—"Whereas, by an indenture dated, &c., and made between —— and ——, the hereditaments hereby granted, were assured to the use of the said A. B., his heirs and assigns for ever," or "to the use of the said A. B. in fee simple."

All that appears from this recital is, that the hereditaments in question were at a certain date conveyed in fee simple to A. B.; no information is given as to who conveyed them, or as to what were his motives for doing so, or as to the manner in which they were conveyed.

The creation of A. B.'s estate having been shown, we must, in the next recital, not only state that his interest became vested, or partially vested in some one else, but show how it became so vested: and the recital is called a *particular* recital.

For example, the next recital might be:—

"And whereas by an indenture dated, &c., and expressed to be made between [*parties*] in consideration of the sum of £—— paid by the said C. D. to the said A. B., the said A. B. granted the said hereditaments unto and to the use of the said C. D., his heirs and assigns, subject to a proviso for redemption of the same premises on payment by the said A. B., his heirs, executors, administrators, or assigns, to the said C. D., his executors, administrators, or assigns, of the sum of £——, with interest thereon in the meantime at the rate and on the day therein mentioned."

The following appear to be the principal exceptions to the rule that the first of the narrative recitals should be general:

1st. Where the first recital is a will. Here, as everything that passes is derived from the bounty of the testator, it would be absurd to make the recital general in form.

2nd. Where the property dealt with is leasehold, and it is necessary to show who the lessor is.

3rd. Where the first recital is a recital of a mortgage deed. But where there were in the mortgage deed several conveying parties besides the mortgagor, the recital is often made general in form.

Reference to parcels.

The parcels are referred to in the recitals as "the messuage or dwelling-house (or 'piece or parcel of land,' or as the case may be) and hereditaments hereby assured," or "[hereinafter expressed (*a*) to be] hereby 'assured,' 'granted,' 'appointed,' 'assigned,' or 'demised,'" as the case requires: or, if the deed relates to copyholds and contains a covenant to surrender, as "the —— and hereditaments hereby covenanted to be surrendered." If there are several witnessing clauses, say, "the —— and hereditaments *first* hereinafter expressed to be hereby *granted*." Where this plan is adopted, the parcels should generally in all subsequent parts of the deed be referred to by the same words. It will be observed that copyholds cannot be described in this manner in a deed which follows the surrender and contains no assurance of them. Where the deed contains an assurance of hereditaments of more than one tenure, they can be collectively referred to as "the hereditaments hereby 'assured,' 'mortgaged,' or 'settled,'" as the case requires, instead of using the longer form, "the hereditaments hereinafter expressed to be hereby granted and assigned and covenanted to be surrendered respectively." If it should be necessary to refer to the hereditaments of different tenures separately, say, "the *freehold* hereditaments hereby *assured*" (*b*).

Introductory recitals.

The introductory recitals are so framed as to explain what is intended to be done by the deed. Care should always be taken to make them correspond exactly with what is subsequently done in the operative part of the deed. Thus in a purchase deed the recital may be, "Whereas the said A. B. has agreed with the said C. D. for the sale to him of the said hereditaments in fee simple in possession and free from incumbrances for the sum of £——." Care must be taken not to refer to any auction or to any preliminary contract in writing by which the bargain was made, as such

(*a*) The words in this bracket are now often omitted.

(*b*) For the form of reference to the parcels in the recitals on an assignment of leaseholds, see *post*, p. 121.

a reference would put notice of it on the title, unless the auction or contract is material to the title. (See an example of this, 1 K. & E. 549.)

If the deed be a marriage settlement, the introductory recital may run:—"And whereas upon the treaty for the said intended marriage it was agreed that the said —— should assign [*description of property assigned*] to the said [*trustees*], upon the trusts, and with and subject to the powers and provisions hereinafter declared and contained concerning the same."

Where a power is to be exercised.

Where it is intended that the deed shall operate as the execution of an express power, the deed by which the power is created should be recited in the narrative recitals, so as to show the creation of the power, and the introductory recital should state that what is intended to be done is intended to be done in execution of the power. Thus, if a mortgagee sells under an express power of sale contained in the mortgage deed, the conveyance will recite the mortgage deed, including the power of sale, and the introductory recital may run as follows:—

"And whereas the said [*mortgagee*], in exercise of the said power contained in the said indenture of the —— day of ——, has agreed with the said [*purchaser*] for the sale to him of the hereditaments hereby granted, and the inheritance thereof in fee simple in possession at the price of £——."

Two schemes for recitals.

There are two very different schemes for framing recitals. In the one, which was till lately the most usual and is the easiest method, they commence with a clear root of title, and are thence continued down in regular order to the time of the conveyance. In the other, which is now adopted by most of the leading conveyancers where the state of the title admits of it, because, when well done, it makes a draft very concise and intelligible, the draftsman states the effect only of the deeds and circumstances on which the existing state of the title depends. The latter method is very enticing to young practitioners, but, as it is difficult, the reader is warned against adopting it until he has considerable

experience, for there is a very great danger of making some error in describing the effects of the deeds and circumstances.

For example, suppose we have to prepare a conveyance of land, which has been conveyed to uses to bar dower in favour of the vendor, and has subsequently been mortgaged several times by him, the recitals framed according to the former scheme would run as follows:—

Recital of conveyance to dower uses.

"Whereas by an indenture dated the —— day of ——, and made between A. B., of the first part, the said C. D. (*vendor*), of the second part, and E. F. (*dower trustee*), of the third part, the hereditaments hereby appointed and granted, were assured to such uses, for such estates, and in such manner as the said C. D. should by deed appoint, and in default of and until any such appointment, and so far as no such appointment should extend, to the use of the said C. D. and his assigns during his life, with remainder to the use of the said E. F. and his heirs during the life of the said C. D. in trust for the said C. D. and his assigns, with remainder to the use of the said C. D., his heirs and assigns for ever;

Of mortgage.

And whereas by an indenture dated the —— day of ——, and expressed to be made between the said C. D. of the one part, and the said G. H. of the other part, in consideration of the sum of £——, paid by the said G. H. to the said C. D., the said C. D., in exercise of the power limited to him by the hereinbefore recited indenture, appointed and also granted and confirmed the hereditaments hereinafter expressed to be hereby appointed and granted, unto and to the use of the said G. H., his heirs and assigns, subject to a proviso for the redemption thereof by the said C. D., his heirs, executors, administrators, or assigns, on payment by him or them to the said G. H., his executors, administrators, or assigns, of the sum of £——, with interest for the same in the meantime at the rate and on the day therein mentioned;

Of state of mortgage debt.

And whereas the said principal sum of £——, and no more, is now owing on the security of the lastly hereinbefore recited indenture, but all interest thereon has been paid up to the date of these presents;" (*Then follow*

*similar recitals of a mortgage to I. K. for £——, and of the state of the mortgage debt; of a mortgage to L. M. for £——, and of the state of the mortgage debt;*) "And whereas the said C. D. has agreed to sell to the said Y. Z., at the price of £——, the fee simple in possession, free from incumbrances of the said hereditaments hereby appointed; And whereas upon the treaty for the said sale, it was agreed that the sum of £——, part of the said purchase money of £——, should be paid to the said G. H. in satisfaction of the debt owing to him as aforesaid, and that the sum of £——, further part of the said purchase money of £——, should be paid to the said I. K. in satisfaction of the debt owing to him as aforesaid, and that the sum of £——, further part of the said purchase money of £——, should be paid to the said L. M. in satisfaction of the debt owing to him as aforesaid, and that the said G. H., I. K., and L. M. should respectively join in these presents in manner hereinafter appearing."

Of contract for sale.

Of agreement that mortgagees shall be paid off and join in conveyance.

[See also the form of conveyance by mortgagor and mortgagee in Stud. Prec. 7.]

According to the second method above described the recitals might run as follows:—

"Whereas by the effect of the indenture, described in the first schedule hereto, the hereditaments hereby assured, stand limited to uses to bar dower in favour of the said C. D., subject only to the several principal sums secured by way of mortgage mentioned in the second schedule hereto, and to the interest thereon, and to the securities for the same respectively which are now respectively vested in the parties hereto of the first three parts [*if the schedule of mortgages be in a tabular form, say,* which are now vested in the persons respectively mentioned in the fourth column of the second schedule hereto], and all interest on the same several sums has been paid up to the date of these presents, and the legal estate in fee simple in the said hereditaments is vested in the said G. H. as mortgagee by virtue of the indenture of the —— day of ——, mentioned in the second

schedule hereto; And whereas the said C. D. has agreed to sell to the said Y. Z., at the price of £——, the fee simple in possession of the said hereditaments free from incumbrances; And whereas upon the treaty for the said sale it was agreed that the said several mortgage debts specified in the said second schedule should be paid off out of the said purchase money, and that the several mortgagees should join in these presents in manner hereinafter appearing."

The schedules would stand as follows:—

*The First Schedule above referred to.*

"An indenture dated the —— day of —— and made between A. B. of the first part, C. D. of the second part, and E. F. of the third part."

*The Second Schedule above referred to.*

"The sum of £—— secured by an indenture of mortgage, dated the —— day of ——, and made between C. D. of the one part, and G. H. of the other part.

"The sum of £—— secured by an indenture of mortgage, dated the —— day of ——, and made between C. D. of the one part, and I. K. of the other part.

*Similar statement of mortgage debt secured to L. M.*

Where there are several mortgages, the second schedule may conveniently assume the following tabular form:—

*The Second Schedule above referred to.*

| Amount of Principal. | Date of Mortgage Deed. | Names of Parties. | Names of Persons in whom the mortgage debts and securities are now vested. |
|---|---|---|---|
| £10,000 | 1st of July, 1860. | 1. C. D.<br>2. G. H. | G. H. |
| £15,000 | 3rd of March, 1865. | 1. C. D.<br>2. I. K. | I. K. |
| £5,000 | 1st of September, 1880. | 1. C. D.<br>2. L. M. | L. M. |

Recitals sometimes omitted.

It is the practice of some of the leading conveyancers to dispense with recitals in simple cases. Suppose, for instance, that the recitals are omitted in a conveyance on a sale under a power, reference would be made to the power in the operative part, which would run as follows:—

"The said A. B., in exercise of a power of sale contained in an indenture dated, &c., and of every other power him enabling, doth hereby appoint, &c."

Although this method of framing assurances is occasionally convenient in the hands of a skilful draftsman, it must be used very carefully, as there is very considerable risk of its causing the draft to be obscure.

Deeds of even date.

It should be noted that in recitals of deeds of even date the words "have" and "shall" are used instead of "had" and "should." For example, the recital of a conveyance in trust for sale of even date with the indenture in which it is recited would be, that "by an indenture of, &c., the said A. has assured certain hereditaments to B. and C. in fee simple on trust that they shall, &c."; while if the recital was not contained in an indenture of even date, the form would be "the said A. assured, &c., on trust that they should, &c."

Operative clauses.

The form of operative clauses necessarily varies according to the nature of the deed, and will be treated of in the discussion of the diffeernt classes of deeds (see *post*, p. 88).

Deeds and contracts are made either for consideration, which may be "valuable" or "good" (*c*), or without consideration, in which case they are called "voluntary."

Valuable consideration.

It requires some thought to understand what amounts to a valuable consideration, or, as it might with greater propriety be called, a consideration valid at law. Money, marriage, doing something which is troublesome to oneself, or of use to the other party to the contract, are all valuable considerations (*d*). Thus, if I promise to give you money,

(*c*) See 2 Bl. Comm. 297.

(*d*) "A valuable consideration, in the sense of the law, may consist either in some right, interest profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken, by

but you do not agree in consideration of such payment to do or forbear something at my request, there is no consideration for my promise, and the law will not give you damages if I fail to fulfil it, unless it is made by deed. But if I were to agree with you to give you five shillings if you would walk half a mile, and you were to perform your part of the contract, there would be a consideration for my promise, viz., the trouble that you would have taken in walking the half-mile. If I were to promise to give you dinner at my house if you would come at a certain time, and you were to come, there would be a binding contract, the consideration for the dinner being the trouble that you would have had in coming. On the other hand, if we were to agree that I should at my expense send to you at your house a dinner from the cook's shop, there would be no consideration moving from you, and the law would not hold me to my promise. But, in the latter case, if I engaged under seal, that is, by deed, to send you the dinner, the fact of the contract being made by deed would do away with the necessity of any consideration, and I should be bound.

In the absence of fraud no inquiry is admitted as to the adequacy of the consideration. (*Westlake* v. *Adams*, 5 C. B. N. S. 248, at p. 265; Pollock, Contr. 169.)

Good consideration.

"Good consideration" merely means the motive of natural affection towards relations, and has no validity against creditors or purchasers. The only effect of it is to raise the use in covenants to stand seised (*e*).

Recapitulation of the doctrine of considerations.

The doctrine of consideration may be stated, shortly, as follows:—

Every simple contract requires a valuable consideration to support it.

A contract under seal does not require any consideration to support it as between the parties. But if there be no valuable consideration, it may possibly be void as against third parties under the 13 Eliz. c. 5, and 27 Eliz. c. 4.

the other"; *Currie* v. *Misa*, L. R. 10 Ex. at p. 162.

(*e*) See Leake, Law of Prop. in Land, 109, 110.

Either a valuable or a good consideration is sufficient to raise a use, or to prevent a resulting use.

Consideration necessary to raise a use.

The subject is explained in a very lucid manner in Leake's Law of Contracts, ch. i. s. 1. See also Pollock, Contr. ch. iv. p. 164; M. L. R. P. 379, 380, and Interp. ch. xi. pp. 145 *et seq.*

There are two reasons why we always express the consideration in a conveyance.

The first depends upon the doctrines of Equity as to raising a use. If, before the Statute of Uses, one man enfeoffed another, the Court of Chancery held that, unless the motive was one which was adequate, the feoffor remained entitled to the use; in other words, that the use "resulted" to the feoffor (*ante*, p. 12). On the other hand, if the motive was adequate, if the feoffment was made for consideration, whether valuable or good, the use enured to the feoffee. It will be remembered (*f*) that the statute has not altered the nature of a use; all that it does is to clothe the use with the legal estate. So at this day, if any conveyance operating by transmutation of possession (see M. L. R. P. 373), and containing no declaration of uses, were to be made without consideration, there would be a resulting use to the person who conveyed, so that he would retain the legal estate; though, if the conveyance contained a declaration of uses, the *cestui que use* would, by force of the statute, take the legal estate. On the other hand, if a conveyance purporting to operate by virtue of the Statute of Uses, were to be made without consideration, no use would be raised, and therefore nothing would pass.

The second reason for expressing the consideration in a deed is that certain contracts not made for a valuable consideration may, though binding on the parties, be void as against persons who are not parties; and, although you are always at liberty to prove the true consideration when it has not been expressed in the deed (*g*), the fact of its not being stated gives rise to the necessity of the proof.

(*f*) *Ante*, p. 6, and see Leake, Law of Prop. in Land, Pt. I. ch. iii. Sect. II. p. 105.

(*g*) See Interp. Rule 39, p. 145.

Conveyances void as against creditors.

The effect of the statute 13 Eliz. c. 5, made perpetual by 29 Eliz. c. 5, is to render any conveyance made by a man in debt to such an amount that he has not ample means to pay his debts void against his creditors, unless the conveyance be *bonâ fide* and for a valuable consideration. (See M. L. R. P. 110 *et seq.*; *Holmes* v. *Penney*, 3 K. & J. 90.)

Voluntary conveyance.

Thus, if a man after his marriage makes a settlement on his wife and children, merely on account of his natural love and affection for them (which does not constitute a valuable consideration), it is liable to be set aside by his creditors, whether it be of real or personal property.

If it be of real property, the settlor could, till lately, sell the property for value, just as if he had not settled it.

This was the result of the 27 Eliz. c. 4, which made void, as against purchasers for value, conveyances of lands made *with intent* to defraud and deceive purchasers. By a judicial interpretation of the statute it became established as a rule of law that, if a man made a voluntary conveyance of lands to A., and then made a conveyance of the same lands for valuable consideration to B., the voluntary conveyance to A. was fraudulent and void under the statute against B. This doctrine rested on the ground that "by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance and shows his intention to sell, as that it shall be taken conclusively against him and the person to whom he conveyed" (*sc.* by the voluntary conveyance), "that such intention existed when he made the [voluntary] conveyance, and that it was made in order to defeat the purchaser" (*h*). This "forced and harsh construction," as it has been called (*i*), is now displaced by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), which enacts that (*k*) no voluntary conveyance

(*h*) *Doe* d. *Newman* v. *Rusham*, 17 Q. B. 724. See M. L. R. P. 112, and 2 Vaizey on Settlements, 1538 *et seq.*

(*i*) *Clarke* v. *Wright*, 6 H. & N. 870, per Cockburn, C.J.

(*k*) Subject (s. 3) to cases in which there have been dealings

of lands, whether made before or after the passing of the Act (29th June, 1893), if in fact made *bonâ fide* and without any fraudulent intent, shall be deemed fraudulent within 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under that Act by a conveyance made upon any such purchase. (The 27 Eliz. c. 4, is not repealed.)

Where there has been a voluntary settlement made before 29th June, 1893 (*Clarke* v. *Willott*, L. R. 7 Ex. 313), there is considerable difficulty in accepting a title deduced either through persons claiming under the voluntary settlement or through the settlor himself. On the one hand, it is not safe to take a conveyance from persons claiming under the settlement, because the settlor may subsequently, before 29th June, 1893, have dealt with the property for value, and thus defeated the settlement; and, on the other hand, it was not safe to take a conveyance from the settlor though made for value, before 29th June, 1893, because it might turn out that there was in fact a valuable consideration for the settlement, though it was apparently voluntary, or that the beneficiaries claiming under the settlement had dealt with their interests for value, and thus the settlement might take effect, or partial effect, against a subsequent purchaser for value from the settlor (*l*).

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47, provides that any "settlement" (*i.e.*, any conveyance or transfer) of property, not being (1) a settlement made before and in consideration of marriage, or (2) made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or (3) a settlement on the wife or children of the settlor of property accruing to him after marriage in right of his wife, shall, if the settlor becomes bankrupt within *two* years after the date of the settlement, be void as against the trustee in bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent

for value with the land before 29th June, 1893.

(*l*) *Clarke* v. *Willott*, L. R. 7 Ex. 313.

time within *ten* years after the date of the settlement, be void as against the trustee in bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of the settlement on the execution thereof. But a conveyance for value by a person claiming under the voluntary settlement to a person who has no knowledge of the insolvency of the settlor, is valid against the trustee in bankruptcy notwithstanding this section, as on the construction of the Act "void" means "voidable" (*m*).

Nominal consideration.

Formerly it was usual to state the payment to every conveying party of a nominal pecuniary consideration. This practice is now obsolete, except where a freeholder wishes to create a term in favour of trustees; for, in the absence of the consideration, raising a use in their favour, which becomes an estate in possession by virtue of the Statute of Uses, they would only have an "*interesse termini*" till they entered. In other cases it can do no good.

Consideration expressed in words.

The consideration is always stated in words at length in the first witnessing clause; and, where there is more than one witnessing clause, it is referred to in the subsequent witnessing clauses as "the consideration aforesaid." The consideration, in the simple case of one vendor and one purchaser, may be expressed as follows, "in consideration of the sum of £——, now paid to the said [*vendor*] by the said [*purchaser*];" and is generally followed by a simple receipt clause in a parenthesis, "the receipt whereof is hereby acknowledged." Till lately it was customary to follow the

(*m*) *Re Vansittart* (1893), 2 Q. B. 377; *In re, Brall, ibid.* 381; approved by the Court of Appeal in *Re Carter and Kenderdine's Contract* (1897), 1 Ch. 776. Where the settlement is set aside the trustee in bankruptcy gains no priority over incumbrancers subsequent to the settlement. *Sanguinetti* v. *Stuckey's Banking Co.* (1895), 1 Ch. 176: approved in *Re Farnham* (1895), 2 Ch. 799.

receipt by a formal discharge (see the old form in Stud. Prec. 128); but as this is unnecessary, it is better omitted.

The Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 5, imposes a penalty of £10 on any person who with intent to defraud the Crown executes or is employed or concerned in or about the execution or preparation of any instrument in which all the facts and circumstances affecting the liability of the instrument to or the amount of ad valorem duty chargeable are not fully and truly set forth. The effect of this is to impose a penalty on intentional omission to state the consideration.

Testimonium, attestation.

The testimonium and attestation, which are not necessary parts of the deed (*n*), are rarely inserted by the draftsman, unless they are required to be of a special form. In cases where it is necessary to have the execution of the deed attested in some particular manner, it is improper to refer to it in the operative part of the deed, though this is sometimes done by the words:—"doth hereby by this indenture, the execution and delivery whereof are intended to be attested by two credible witnesses." The insertion of these words is quite useless; for the mere intention to have the execution of a deed witnessed in a particular manner is a different thing from having it actually done; and the words, being useless, should, according to the general rule, be omitted. In those cases where the deed has to be executed in a particular manner, attention should be called to the point by a marginal note on the draft.

(*n*) Co. Lit. 7 *a*; *Burdett* v. *Spilsbury*, 6 Man. & Gr. 457; *Garrett* v. *Lister*, 1 Lev. 25; Shep. Touch. 55.

## CHAPTER V.

### PURCHASE DEEDS OF INTERESTS IN LAND.

We propose to discuss in this chapter conveyances; first, on the sale of freeholds, and second, on the sale of other interests in land, by a person under no disability; and to consider, subsequently, how the form of the conveyance depends on the status of the conveying parties.

Kinds of conveyances.

Conveyances of the following classes are still to be met with in abstracts:—

1. Feoffment with livery.
2. Lease and Release.
3. Bargain and Sale, inrolled under 27 Hen. 8, c. 16.
4. Covenant to stand seised.
5. A release made in pursuance of an Act of Parliament intituled An Act for rendering a release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same parties. See 4 & 5 Vict. c. 21 (repealed by the Statute Law Revision Act, 1874 (No. 2)).
6. A deed of grant.
7. An appointment under a power.
8. Fines.
9. Recoveries.

But although all these, except the fifth and last two, may be used at the present day, conveyancers rarely employ any except a deed of grant, or an appointment under a power.

Assurances of freeholds may be divided into two classes:—*first*, where the legal estate passes without the operation of the Statute of Uses; and *second*, where the conveyance operates as a declaration of the use only, so that the legal estate passes by virtue of the Statute of Uses. Assurances

of the former class are said to operate by "transmutation of possession" (see this fully discussed, M. L. R. P. 372). The distinction is important for conveyancing purposes. Where a conveyance operating by transmutation of possession is made to A. in fee simple, and uses are declared on his seisin in favour of B., B. takes the legal estate by virtue of the Statute of Uses; but if the conveyance to A. merely operates as a declaration of the use, so that A. takes the legal estate by virtue of the Statute of Uses, and uses are by the same conveyance declared in favour of B., B.'s estate is equitable only, for "there cannot be a use upon a use" (*ante*, p. 10). "Transmutation of possession."

*First.*—A feoffment with livery. This is the best possible example of a conveyance operating by transmutation of possession, because the conveyance is effected by the livery, *i.e.*, by the delivery of seisin or change of possession only. The accompanying deed, called a charter of feoffment, was formerly of use only as bearing witness of what had already happened, and accordingly the operative words were in the past tense, but were repeated in the present tense, for the sake of confirming the feoffment. "The [*feoffor*] hath granted, enfeoffed, and confirmed, and by these presents doth grant, enfeoff, and confirm unto," &c. (See form in Stud. Prec. 128.) Feoffment.

The Statute of Frauds (29 Car. 2, c. 3) rendered it necessary that a writing should be signed by the feoffor or his agent duly appointed: and the Real Property Act, 1845 (8 & 9 Vict. c. 106), renders every feoffment (except a feoffment made under a custom by an infant) void unless evidenced by deed.

Formerly, if a tenant for life or years, made a feoffment, or even, it is said (4 Byth. by Sweet, "Feoffment," 43), if a person having no estate or interest in the land, but mere naked possession, made a feoffment; the feoffee acquired a fee simple (*a*). This operation of a feoffment, called a "tortious" operation (*Taylor* d. *Atkyns* v. *Horde*, 2 Sm. L. C.), was Tortious operation of feoffment.

(*a*) A disseisee might in certain cases reacquire his seisin by entry or action.

made use of in conveyancing for various purposes (which are discussed in 4 Byth. by Sweet, "Feoffment"), but, as this operation has been abolished by the Real Property Act, 1845, it is unnecessary to discuss it here (*b*).

It is, perhaps, necessary to remind the reader that, while a feoffment can be made of corporeal hereditaments only, a feoffment of corporeal hereditaments will pass incorporeal hereditaments appurtenant to them. The object of using the word "grant" in the charter of feoffment was to pass any incorporeal hereditaments, which, not being strictly appurtenant to the land, did not pass by the feoffment. Butler, Co. Lit. 384 *a*, n.

As a feoffment is a conveyance operating at Common Law, uses can be declared on the seisin of the feoffee in favour of other persons, and they become seised of the land by virtue of the Statute of Uses.

Lease and release.

*Second.*—A conveyance by lease and release (Stud. Prec. 141). The operation of this has already been described (*ante*, p. 13). It was the most common form of conveyance until the year 1841, when it fell into disuse, as by 4 & 5 Vict. c. 21, a release expressed to be made in pursuance of the Act (see form in Stud. Prec. 145) had the same effect as a release founded on a lease for a year.

Bargain and sale.

*Third.*—A bargain and sale inrolled under 27 Hen. 8, c. 16. The effect of this has been already explained (*ante*, p. 12). It must be remembered that as the operation of a conveyance by bargain and sale inrolled depends upon the Statute of Uses, if any uses are declared on the seisin of the bargainee, these being uses upon a use are not executed by the statute, and the *cestui que use* will take an equitable interest only.

Covenant to stand seised.

*Fourth.*—A covenant to stand seised. (See form in Stud. Prec. 146.) Here the consideration is natural love and affection, which, as already pointed out (*ante*, p. 71), is sufficient consideration to support a use.

As has already been stated, a bargain and sale inrolled,

(*b*) See Leake, Law of Prop. in Land, 57 ; Challis, R. P. 371.

and a covenant to stand seised, differ in their operation from the other modes of conveyance. Before the Statute of Uses no estate passed by a bargain and sale, or a covenant to stand seised; all that passed was "a use," that is, a trust enforceable in Equity. A bargain and sale, it will be remembered, was simply a contract to sell land for money, while a covenant to stand seised was where a man wished to provide for his relations, and covenanted that on account of his "natural love and affection" he would stand seised to their use. In neither of these cases did any legal interest in the land pass; only the use passed; but when the Statute of Uses came into operation, it transferred the legal estate to the *cestui que use*, the person who was entitled to enjoy the use.

*Fifth.*—The statutory release under 4 & 5 Vict. c. 21, had the same effect as a release founded on a lease.

*Sixth.*—A deed of grant, which was formerly the proper method of conveying remainders and reversions, and other incorporeal hereditaments, has now (owing to the Real Property Act, 1845, 8 & 9 Vict. c. 106, which enacts that all corporeal hereditaments shall lie in grant) superseded all other deeds for the purpose of conveying estates of freehold (whether in corporeal or incorporeal hereditaments), except a bargain and sale by executors at Common Law, and an appointment under a power. Grant.

In a well-known text-book, a grant to uses is classed among the deeds that take effect under the Statute of Uses. This is an error, for the effect of the deed in conveying the legal estate in corporeal hereditaments depends upon the Real Property Act, 1845, not upon the Statute of Uses. No doubt uses may be declared on the seisin of the grantee, and then the Statute of Uses vests the legal estate in the *cestui que use*, if he be a different person from the grantee. But, according to the classification commonly adopted by conveyancers, a deed of grant is one that operates by transmutation of possession, as distinguished from those which take effect under the Statute of Uses.

Deeds construed grants so as to take effect (*c*).

Owing to the effect of a deed of grant in conveying remainders and reversions, it sometimes happened that when a charter of feoffment was made without livery of seisin, or a bargain and sale was not inrolled within the proper time, or the lease for a year was omitted in a conveyance by lease and release, the conveyance, apparently imperfect, conveyed the property; for it might happen that, owing to the existence of a term of years or some other estate preceding that of the grantor, his interest was reversionary; and even the existence of a yearly tenancy was sufficient to render it such. Whenever this occurred, any deed intended to convey the immediate freehold in possession, but failing to do so in the mode intended, was construed as a deed of grant, so as to pass the grantor's reversionary interest, if, by putting this construction on it, the intention of the parties could be carried out; and now that corporeal hereditaments lie in grant, a similar construction will be placed on any inaccurately expressed assurance, whether the grantor's interest is reversionary or not, if, by such construction, the property will pass according to the intention of the parties.

Appointments under powers.

*Seventh.*—There are two classes of powers under which an appointment may be made, viz., (1) powers operating merely by way of declaration of uses, and (2) powers operating at law (M. L. R. P. 298). The distinction between them is of importance, for an appointment made under a power of class (1) does not operate by way of transmutation of possession, while an appointment made under a power of class (2) does so operate. In other words, if uses are declared on the seisin of the appointee, and the power is of class (1), the *cestui que use* takes an equitable estate only; while if the power is of class (2) he takes the legal estate by virtue of the Statute of Uses. The manner in which an appointment under a power of class (1) operates is discussed *ante*, p. 9.

Powers operating at law may be divided into powers which

(*c*) See Interp. Rule 9, p. 40.

operate at the common law, and those which operate by virtue of a statute.

Common law powers; bargain and sale by executor.

The only example of a power of the former class occurs where a testator by his will authorises his executors to sell his freehold lands, but does not devise the land to them. A conveyance made by the executors under this power is called "a bargain and sale by executors." This is a very old form of conveyance. Although lands could not generally be devised by will before the Statute of Wills (32 Hen. 8, c. 1), they could in some places be devised under a custom. And wherever this custom existed, it enabled a man to devise that his land should be sold by his executors. They had then a right or power by the custom to sell and convey the land; they could not make a feoffment because they had no estate in or possession of the land; so they executed a deed conveying the land, which, it will be remembered, had not been devised to them, and therefore did not belong to them. After the Statute of Wills rendered lands generally devisable, the rule of law allowing executors to convey on a devise that they should sell the lands remained in force. The customary power was superceded by the statutory power. As the bargainee or person to whom the land is conveyed is in under the Statute (*cc*), uses can be declared on his seisin. The operative words generally used are, "bargain and sell." This conveyance is still occasionally employed. (See form in Stud Prec. p. 16.)

The distinction between the case of a devise that the executors shall sell the land, and a devise of lands to the executors to be sold, is one of the utmost importance. In the first case there is merely a power operating at Common Law, and the land descends to the heir-at-law until the sale takes place. The power could formerly be exercised only by *all* the executors, so that if one executor renounced, the lands could not be sold; but the Act 21 Hen. 8, c. 4,

(*cc*) As to the distinction between statutory and other powers, see M. L. R. P. 298.

enables the executors who prove the will to exercise the power (Butler, Co. Lit. 113 *a*, n.). In the other case, the estate in the land passes to the executors (not in that capacity, but as trustees) as joint tenants; the power is an equitable one only, and is annexed to the estate, so that if one disclaims the estate, the others can sell (*Nicloson* v. *Wordsworth*, 2 Swanst. 365). See as to powers and trusts created since 1881, the C. A. 1881, s. 38, which provides that when a power or trust, created after 1881, is given to two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument creating the trust, the same may be exercised or performed by the survivors or survivor.

Statutory powers.

By various statutes power is conferred on persons who have "limited interests" in the land, *i.e.*, estates less than a fee simple, or even on persons who have no estates in the land, to convey the fee simple to a purchaser. The most important of these statutes are the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the amending Acts 23 & 24 Vict. c. 106, 32 & 33 Vict. c. 18, and 46 & 47 Vict. c. 15, and the S. L. Acts 1882 to 1890.

Lands Clauses Consolidation Act, 1845.

Sometimes it is thought proper by Parliament to enable persons or a company to purchase land for the purpose of some undertaking, such as a railway, which will be for the advantage of the public. In such cases it may happen that there is no person able to convey the land required for the undertaking, and, even if such person exists, he may be unwilling to sell it. It is therefore necessary to give a statutory power to the "promoters of the undertaking" to purchase land (*d*), whether the owner is willing to sell or not, and also to enable a limited owner to convey. It was formerly the practice to embody provisions of this nature in the Act which enabled the undertaking to be carried out. But in 1845 the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), was passed containing provisions of this nature which are incorporated by reference in the

(*d*) New easements cannot be acquired compulsorily. *G. W. Rly. Co.* v. *Swindon, &c., Rly. Co.*, 9 App. Cas. p. 787.

Act (called the "special Act") authorising the undertaking to be carried out. It is impossible in a book of this nature to discuss these provisions in detail; but the general scope of the Act is as follows:—

Power is given to the "owner" of the land, meaning thereby not only the owner in fee simple but certain other persons (defined in s. 7), to sell and convey the land to the promoters of the undertaking; and there are provisions for securing that the sale shall be made at a proper price. If the price cannot be agreed upon, it is to be determined by arbitration or by a jury; and, if the owner declines to convey, or if he fails to show title, or if he cannot be found, the promoters of the undertaking can, on payment of the money into the Bank to the credit of the Paymaster-General, vest the lands in themselves by means of a deed poll in the statutory form. In all cases where the owner is not absolutely entitled to the purchase money and it amounts to or (s. 69) exceeds £200, it has to be paid into the Bank. There are provisions for making orders of Court as to investment of the money so paid in, payment of the income of such investments to persons having limited interests, and payment out of the capital to any persons becoming absolutely entitled to the fund in the Bank. If the purchase money is less than £200 and exceeds £20, it may, with the consent of the promoters of the undertaking, be paid to two trustees to be nominated by the owner, and it is to be applied in the same manner as money paid into the Bank, but without the necessity of obtaining an order of Court for such application. If the purchase money does not exceed £20, it is to be paid to the person entitled to the rents and profits for his own use, though he may be only a limited owner.

A discussion of the S. L. Acts will be found *post*, Ch. XI., Part III.

In framing a deed to take effect as an appointment, the recitals (if any) should show that those events have happened which render the power capable of being exercised, and who is able to exercise it.

Fines and recoveries.

*Eighth and Ninth.*—A short explanation of the operation of fines and recoveries will be found, *ante*, p. 3, and in any old edition of Blackstone's Commentaries, and in Sheppard's Touchstone. It suffices here to remark that each of them operated so as to convey the legal estate, and that it was the custom to execute either before or after the fine was levied, and before the recovery was suffered, a "deed to lead the uses," *i.e.*, to declare the uses to which the lands which passed by the fine or recovery should be held. The joint effect of the fine or recovery and the deed was to vest the legal estate in the *cestui que use*.

Deed of grant.

Prior to 1882, an ordinary deed of grant of freeholds consisted of the following parts:—

1. The date.
2. The parties.
3. The recitals.
4. The consideration.
5. The receipt.
6. The operative words of conveyance, and the name of the grantee, *i.e.*, the person to whom the conveyance was made.
7. The parcels, general words, and "all the estate" clause.
8. The habendum.
9. The declaration of uses.
10. The covenants for title.
11. The testimonium.
12. The attestation.
13. The indorsed receipt.

In deeds since 1881 it is usual to omit the "general words" and "estate clause" in reliance on the provisions of the C. A. 1881, ss. 6, 63, and to imply the covenants for title by using the appropriate words under s. 7. The indorsed receipt may be omitted in reliance on s. 54.

The principal questions arising on the first four and the eleventh and twelfth parts have already been discussed in Chapter IV.

3. In simple cases recitals are omitted. If they are inserted, it is advantageous, in most cases, to recite the last conveyance by which the parcels were conveyed, for this greatly facilitates the identification of the property. In such a recital the parcels were formerly described as "the hereditaments hereinafter expressed to be hereby granted," but according to the modern practice as "the hereditaments hereby granted" or "assured." Recitals (*e*).

In framing the narrative recitals the draftsman must show that the entire legal and equitable fee is vested in the parties who convey; or, in cases where the sale is made by order of the Court, or by a person exercising an express or statutory power of sale, he must show such a state of facts as gives jurisdiction to the Court to make the order, or enables the power to be exercised.

In the ordinary case the introductory recital merely states that "the said [*vendor*] has agreed with the said [*purchaser*] to sell to him, at the price of £——, the fee simple in possession, free from incumbrances, of the hereditaments hereby granted."

If the sale be made under a power, the recital may run, "the said [*vendor*] has by virtue of the said recited power agreed to sell," &c. If it be made under a statutory power, it may run, "by virtue of the powers conferred on him by the S. L. Acts 1882 to 1890," or as the case may be.

In cases where the purchase is made by trustees, and where this necessarily appears on the face of the conveyance, it is more convenient to state the agreement as one "for the purchase."

As before noticed (p. 61), the generality of the recital that the property is sold free from incumbrances does not enlarge the express or implied qualified covenant against incumbrances; and therefore no trustee or mortgagee need fear to allow such a recital to be inserted in the deed.

Where the property is intended to be conveyed subject

(*e*) See further, *ante*, p. 59 *et seq.*

to incumbrances, their existence should generally be recited; but it depends upon circumstances whether or not it is desirable to show how they arose. In these cases the contract should be stated to be for the sale "free from incumbrances, except the said ('mortgage,' or as the case may be)." If no recitals are inserted in the deed, the incumbrances should be noticed in the habendum (1 K. & E. 401).

Formerly it happened occasionally, in badly drawn deeds, that no notice was taken of the incumbrances in the recitals or habendum; they were mentioned only in the covenants for title.

Receipt. 5 and 13. Where the consideration is money, the statement of it is followed by the receipt clause, which was formerly followed by a formal discharge for the money (see form in Stud. Prec. 128); as this discharge is utterly useless, it has fallen into disuse and should be omitted. The effect of the receipt is, at law, to prevent or estop the person who states that he has received the money from showing that the money was not paid. But in Equity this was formerly not the case; for neither the receipt in the body of the deed (*Winter* v. *Lord Anson*, 3 Russ. 488), nor the indorsed receipt (*Straton* v. *Rastall*, 2 T. R. 366), prevented the person who acknowledged the receipt from showing in Equity that the money was not paid. The rule was applied against the purchaser, against all persons claiming under him with notice that the money had not been paid, and in some cases against persons claiming under him without notice (Dart, V. & P. 825). Where, however, both receipts were in the usual form, a sub-purchaser or sub-mortgagee who acquired the legal estate, and obtained the title deeds, was not obliged to inquire further; for, if the rule were different, no one would have been safe in making a purchase (*f*).

The rule which required both receipts has been modified

(*f*) *White* v. *Wakefield*, 7 Sim. 401; *Bickerton* v. *Walker*, 31 Ch. D. 151.

as to deeds executed since 1881 by the C. A. 1881, ss. 54, 55, which provide that a receipt in the body of a deed shall be a sufficient discharge for the consideration without any further receipt being indorsed on the deed, and that a receipt, either in the body of the deed or indorsed thereon, shall, in favour of a subsequent purchaser (see the definition of "purchaser," s. 2, viii.), without notice that the consideration was not paid, be sufficient evidence of payment.

There appears therefore now to be no reason for indorsing a receipt, except where, as in the case of companies, it is the practice to indorse a receipt signed by an official, or when, as in the case of purchases made under an order of Court, it is the practice to execute the conveyance before the money is paid.

Payment of purchase money to solicitor.

Formerly payment to the solicitor for the vendor was not a valid payment in the absence of express authority from the vendor to the solicitor to receive the purchase money (Dart, V. & P. 742), and this was so even if the solicitor handed over the purchase deed executed by the vendor with the indorsed receipt signed by the vendor. The rule is now altered by the C. A. 1881, s. 56, which provides that the production by a solicitor of a deed containing a receipt, or having an indorsed receipt (the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt), shall be a sufficient authority for the payment of the consideration to the solicitor. The Act appears to apply only to cases where a valid authority could have been given to the solicitor prior to the Act; so that it did not authorise the payment of trust money to a solicitor, as it is doubtful whether trustees can authorise the payment of trust money to him (Dart, V. & P., 6th ed., p. 745; Dav. Prec. Vol. II., part i., p. 331, note, Vol. III., p. 223, note; *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387). But by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 17, repealing and re-enacting the Trustee Act, 1888 (s. 2), a trustee may authorise his solicitor

to receive money by permitting the solicitor to have the custody of and to produce a deed containing a receipt (*g*).

In cases where parts of the purchase money are to be paid to several persons, as where mortgagees are to be paid off out of the purchase money, it must not be supposed that the solicitor of the person who last executes the deed can, as having possession of the deed, give a receipt for the entire purchase money, for it has been laid down that the solicitor cannot give a receipt unless he is acting for the party to whom the money is expressed to be paid (see 40 Ch. D. p. 494, per North, J.).

Operative words.

6. As to the operative words.

It used to be the universal practice, and still is the practice of unskilful draftsmen, to use a great many words without having regard to their true meaning, and also to use them both in the past and present tense; thus, in a release founded on a lease for a year, the words used were: "He the said A. B. hath granted, bargained, sold, aliened, released, and confirmed, and by these presents doth grant, bargain, sell, alien, release, and confirm." The practice of using both tenses appears to have been adopted from the practice in a charter of feoffment, where, as already mentioned, this was commonly done. In the instance given all the words, with the exception of "grant and release," are simple surplusage; and in the recital of such a deed these would be the only operative words mentioned.

The occasions for the employment of the various operative words are the following:—

"Appoint," in the execution of a power: if the power contains any special words they are commonly followed.

(*g*) See *Day* v. *Woolwich Equitable Building Society*, 40 Ch. D. 491, where it was held that it is not enough for the solicitor to have the deed in his office without actually producing it; and *Re Hetling and Merton's Contract* (1893), 3 Ch. 269, where a mere general power of attorney to execute deeds and transfer property was held not sufficient.

"Assign," in a conveyance of personalty.

"Alien" (now disused), absolutely parting with an estate.

"Enfeoff," in a charter of feoffment.

"Confirm," where there has been a previous conveyance to the grantee, and it is intended to confirm it.

"Convey," may be used in a conveyance of property of any nature. It is sometimes erroneously believed to have some statutory effect owing to its being used in the 4th Schedule to the C. A. 1881.

The word "grant."

"Grant," formerly the proper word for conveying freeholds not lying in livery (see Shep. Touch. 228). As since the 1st October, 1845, all corporeal hereditaments lie in grant (see the Real Property Act, 1845, 8 & 9 Vict. c. 106), the word "grant" is the operative word now generally used in any conveyance of freeholds; although by the C. A. 1881, s. 49, it is declared that "the use of the word grant is not necessary in order to convey tenements or hereditaments corporeal or incorporeal."

It is sometimes stated that at Common Law the word "grant" raised implied covenants for title on the part of the grantor. This broad statement of the effect of the word is erroneous. (See Butler, Co. Lit. 384 *a*, n.) The error being prevalent, it was enacted by the Real Property Act, 1845 (8 & 9 Vict. c. 106, s. 4), that the word should not imply any covenant, except so far as it should imply a covenant by force of any Act of Parliament. The word "grant" implies, in favour of a purchaser, covenants for title in a conveyance *by* the promoters of an undertaking under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 132; and in conveyances *to* the Governors of Queen Anne's Bounty, under the Queen Anne's Bounty Act, 1838 (1 & 2 Vict. c. 20, s. 22), unless, in either case, the implication is expressly negatived by the conveyance (*h*).

(*h*) The words "grant, bargain, and sell," in bargains and sales of hereditaments inrolled under the Yorkshire Registry Acts, 6 Anne,

When trustees are conveying parties, unskilled draftsmen sometimes add, after the word "grant," "*by way of conveyance only, and not by way of warranty.*" The words are utterly useless, and ought always to be omitted. However, when they are inserted by the advisers of the trustees, it is not worth while to strike them out (*ante*, p. 40).

"Surrender," in the conveyance of a term or of a particular estate, to the intent that it may merge.

"Release," in the conveyance of a remainder or reversion to the person in possession, or where one joint tenant releases his estate to another (Co. Lit. 9 *b*); or to release either property or a person from any claim.

"Remise, release, and quit-claim," the old form of releasing property from a claim.

"Acquit, release, and quit-claim," the old form of releasing a person from a claim.

"Demise," formerly "demise, lease, and to farm let," the word used in granting a term.

"Dispose of," sometimes used in a conveyance by a married woman by deed acknowledged, and by a tenant in tail in a disentailing assurance, under the supposition that it has some statutory force (*i*).

"Bargain and sell," where a pecuniary consideration passes, and it is intended to raise a use. If the deed be inrolled under the Statute of Inrolments, a freehold interest, otherwise only a term, can pass. Bargains and sales taking effect under the Statute of Uses are now rarely used, except where a freeholder creates a mortgage term.

c. 35, ss. 30 and 34, and 8 Geo. 2, c. 6, s. 35, implied the usual covenants for title in favour of a purchaser. But these Acts are repealed by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), which contains no similar provision. So under the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47, s. 46), now repealed.

(*i*) The reason appears to be that "dispose of" are the words used in the enabling sections of the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74, ss. 15, 77).

If he uses the words "bargain and sell," the mortgagee acquires possession for the term by virtue of the statute, without its being necessary to inrol the deed, or for him to enter (*ante*, p. 13).

"Bargain and sell" used by executors selling under a Common Law power (*ante*, p. 81).

Name of purchaser in premises.

It used to be the practice to add to the name of the person to whom the conveyance is made in the premises (*i.e.*, the part of the deed before the *habendum;* Interp. 210), words of limitation stating the nature of the estate that he takes, which, if he be a grantee to uses, is generally an estate in fee simple; but this is not necessary, and such words are now omitted, for the object of stating the name of the purchaser in the premises is to show who the purchaser is, not what estate he is to take (Interp. 210). Thus the proper way to limit a fee simple is to convey "to A."—not to A. and his heirs—the parcels, to hold "to A. and his heirs," or "to A. in fee simple" (*k*).

Parcels.

7. The parcels are generally inserted in the operative part of the deed, although in some cases, as in the assignment or surrender of a lease (Stud. Prec. 31), the transfer of a mortgage not by indorsement (*ibid.* 63), a disentailing assurance (*ibid.* 79), or the appointment of a new trustee, they may be more conveniently set out, if at all, in the recital of the lease, mortgage, or settlement, and be conveyed by reference. Parcels should generally be described according to their quality, as arable, woodland, and the like, their quantity, *i.e.*, according to the statute measurement, with their abuttals, and the names of the occupiers. The description may either be given only in the body of the deed, or (which is generally more convenient) with the aid of a schedule to the deed, and a map drawn on the deed (1 K. & E. 387; Stud. Prec. 48). In cases where intermixed or adjacent land, held on different titles, is dealt with by the same deed, the

(*k*) See the cases where the estate, if any, limited to the grantee in the "premises" differs from that limited to him in the habendum collected in Interp. 210.

use of several schedules will generally be found to facilitate the draftsman's task.

The parcels are generally copied from the last conveyance. In this case, if (as generally happens) the several parcels are described as being in the possession of named persons, care should be taken that any changes of occupancy are noticed. Generally it is unnecessary to retain the names of all the former occupiers, but it is convenient to retain the name of the occupier mentioned in the last conveyance as well as that of the present tenant. The language may be, "late in the occupation of A. B., but now of C. D."; or, if there have been intermediate tenants—"formerly in the occupation of A. B., but now of C. D." It is hardly necessary to say that the property ought not to be described by occupancy alone, for, if that be done, nothing passes except that which is occupied according to the description, a matter as to which it may be difficult to obtain evidence on the occasion of a future sale or mortgage. Attention to details of this nature is extremely irksome, but it is essential. In the case of a large property it may be desirable to have the parcels in the draft conveyance compared with the existing rent roll.

Sometimes the property has become so much altered since the last description in a conveyance that an entirely new description has to be framed. In this case the new and old description should be connected together, so as to preserve evidence of identity (1 K. & E. 389).

Where the entirety of a property is conveyed by an old description and also by a modern description, some words should be inserted for the purpose of showing that the generality of the old description is not to be limited by the modern description; but where part only of a larger property is conveyed, it will generally be proper to state that the modern description shall not be enlarged by the generality of the old description.

Where the land is divided into farms, it is sometimes convenient to add columns in the schedule showing the

amount of rent and the nature of the tenancy. This may conveniently be done as follows :—

| Number referring to Map. | Name. | Quality. | Acreage. | Name of Occupier. | Amount of Rent. | Nature of Tenancy. |
|---|---|---|---|---|---|---|
| | | OLD HALL FARM. | | | | |
| 37 | Beaconfield ... | Meadow... | 13 2 3 | Jesse Harmer. | | |
| 38 | Beaconshaw ... | Wood ... | 7 1 0 | | | |
| 39 | Brookland ... ... | Arable ... | 6 3 2 | | £35 | Yearly Tenancy |
| 40 | Big Brookland ... | Pasture ... | 7 3 2 | | | |
| 41 | Starve Crow Piece | Arable ... | 5 1 13 | | | |
| | | | 40 2 20 | | | |
| | | NEW HALL FARM. | | | | |
| 53 | Spratsfield ... ... | Meadow... | 7 3 2 | Mary Smith. | | |
| 54 | Spratsbarn... ... | Do. ... | 0 1 3 | | | Lease for seven years from Midsummer, 1878. |
| 55 | The Great Meadow | Arable ... | 50 3 2 | | | |
| 56 | The Forty Acres | Do. ... | 39 1 13 | | £150 | |
| 57 | Leaseowes ... ... | Do. ... | 30 2 0 | | | |
| 58 | Ridge Field ... | Do. ... | 15 1 2 | | | |
| 59 | Great Ridge Field | Do. ... | 16 3 3 | | | |
| | | | 160 2 25 | | | |

It is proper always to refer to the same set of parcels in exactly the same words. Thus, if they are described as "messuages and lands" in one place, they should not be described as "farms and hereditaments" in another. If this is not attended to, a good deal of trouble may be occasioned to a person reading the deed hastily for the purpose of ascertaining what was done with any particular parcel.

On the purchase of a very large property it will often be found that different parts of it are held on different titles. Generally, owing to the improvements that every new purchaser makes, by turning roads, grubbing fences, and the like, it soon becomes difficult, or even impossible, to distinguish the different parts; a fact which may give rise to considerable trouble and expense on any future dealings with the property.

This may be avoided by procuring the ordnance maps in which the several parts of the property are delineated, and Maps.

having them coloured with reference to the different titles on which the property is held.

It should be remembered that the acreage given in the books of reference to the ordnance maps is measured to the centre of the hedge, without taking into consideration to which field the hedge and ditch belong.

It is hardly necessary to state that on the examination of an abstract with the deeds the parcels should be examined with most scrupulous attention.

In a subsequent part of the deed the parcels may be referred to as "the hereditaments and premises hereby granted," or "first hereinbefore released," as the case may be, or "hereby assured." See *ante*, p. 64.

Sometimes lands of different tenures are intermixed and the parcels of different tenures cannot be distinguished. In such cases, in the conveyance of the freeholds, the parcels are described as "All such and so many and such parts and part of the several hereditaments hereinafter described as are of freehold tenure"; while in the conveyance of the copyholds or leaseholds similar words, with the substitution of "copyhold" or "leasehold" for "freehold," will be used.

General words (*l*).

In deeds prior to 1882 the "general words" follow the parcels. They were added for the purpose of passing easements, profits *à prendre* and other rights which, though habitually enjoyed with the parcels, were not legally appendant or appurtenant to them. In deeds since 1881 the general words are omitted in reliance on the C. A. 1881, s. 6, which provides that in a conveyance of "land," of "land having houses or buildings thereon," or of "a manor," the appropriate general words shall be implied, unless a contrary intention is expressed in the conveyance (*m*).

(*l*) See Interp. 186 *et seq.*, and forms in Stud. Prec. 2 n. (*d*) 129.

(*m*) The section does not apply to a *contract* for sale; and therefore, under a contract for sale of land "with the appurtenances," the purchaser is entitled to have in the conveyance only such general words as he would have been entitled to before the C. A. 1881; *Re Peck and School Board for London* (1893), 2 Ch. 315.

It will be observed that the Act does not, except in the case of a manor, mention "mines and minerals," but this is immaterial, as they pass by the conveyance of the land, except in conveyances to railway companies, where they are excepted unless expressly mentioned (Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 77), and in conveyances under the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17, s. 18), and except in the case of copyholds (*n*).

Easements, &c. (*o*).

Easements and profits *à prendre* are generally rights enjoyed by a person as the owner of a particular piece of land as appurtenant thereto. It appears that a profit *à prendre* (*p*) (see M. L. R. P. 13 note), can exist in gross, *i.e.*, can be enjoyed irrespective of the ownership of particular land; but such existence is rare, and the following remarks will not apply to easements or profits *à prendre* in gross.

Where the owner of land (or the occupier as claiming under him) has a right to do something on his neighbour's land, as to walk along it by a way not open to the public, or to pasture his cattle on it, or to prevent the neighbour from doing something on the neighbour's land, as blocking up a ditch for instance, the right is called an easement or a profit *à prendre*; the distinction being that a right (such as a right of way) in respect of which the person entitled to exercise the right can only use his neighbour's soil without taking any profit out of it, is an easement; while a right, such as that of pasturing his cattle, in respect of which he does derive profit out of his neighbour's soil, is a profit *à prendre*.

It will be remarked that the existence of such rights (so

(*n*) A conveyance of copyholds passes the *copyhold interest* in the minerals, *i.e.* (in effect), the possession, as of a tenant at will, but the copyholder cannot work them unless there is a special custom.

(*o*) See M. L. R. P. 337.

(*p*) See *Shuttleworth* v. *Le Fleming*, 19 C. B., N. S. 687. But probably an easement cannot be in gross; see Leake, Uses and Profits of Land, 190, citing *Rangeley* v. *Midland Ry. Co.*, L. R. 3 Ch. 311, per Cairns, C.

far as they are not in gross) supposes the existence of, and a relation between, two tenements (*Mounsey* v. *Ismay*, 1 H. & C. 729, 3 H. & C. 486). The tenement in respect of which the right of enjoyment exists is called the "*dominant* tenement," the other is the "*servient* tenement."

Definition of easement.

An easement may be defined as "an incorporeal right imposed for the benefit of a tenement over corporeal property, but giving no right to the participation in the profits of it" (*q*). An easement can exist only by virtue of a grant by the owner of the servient tenement, which grant may be either express or implied, or by prescription or custom, words which require some explanation.

Prescription and custom.

It is evident that, if any right of property is enjoyed uninterruptedly for a great many years, the presumption becomes very strong that the person enjoying it is lawfully the owner of it.

Where the right of property thus enjoyed is an incorporeal hereditament, and has been enjoyed uninterruptedly for so long a time by the person claiming it and his predecessors, or by a class of whom he is one, that the law recognises the right owing to the length of user only, he is said to have a title by *prescription* or *custom*. The distinction (*r*) is that a custom means a local usage, not a right belonging to a particular person; while a right by prescription belongs to a particular person or to the person who is owner of particular lands. (*Hanmer* v. *Chance*, 4 De G. J. & S. 626.) The examples given in Co. Lit. 113 *b* (cited in M. L. R. P. 342) will render this clear. Where a man seised in fee of the Manor of Dale pleads that he and his ancestors and all those whose estate he hath in the said manor, have time out of mind of man had and used

(*q*) Easements and profits *à prendre* are incorporeal rights "because the owner has not possession of the land which is the corporeal subject of property, but only the use of it for certain purposes, or some profit derived from it, whilst it remains in the possession of another" (Leake, Uses and Prof. 185); and per Kay, L.J.; *Metropolitan Railway Co.* v. *Fowler* (1892), 1 Q. B. at 181.

(*r*) See Leake, Uses and Prof. 551.

to have common of pasture in such a place, being land of another, as pertaining to the said manor, this is prescription. But where, on the other hand, a copyholder of the Manor of Dale pleads that within the said manor there is and hath been such a custom time out of mind of man used, that all the copyholders of the said manor have had and used to have common of pasture in such a waste of the lord, parcel of the said manor: this is not prescription, but a custom (*Warrick* v. *Queen's College, Oxford*, L. R. 10 Eq. 105) (*s*).

A profit *à prendre* can be claimed by grant or prescription, but not by custom, except where copyholders claim it out of the lord's waste (*Rogers* v. *Brenton*, 10 Q. B. 26); one reason apparently being that the persons claiming by custom might become so numerous as to take all the profit of the soil (*t*).

Unity of title.

If the same person becomes owner of both servient and dominant tenements, the easement is destroyed, and the exercise by him over the former servient tenement of a right which, before the unity of the title, was an easement, ceases to be an easement, and is referable only to the exercise of the right of property in the servient tenement (*u*). But, if he continues to exercise the right, it remains by reputation an easement annexed to the former dominant tenement. Although easements, strictly so called, pass without express words by the conveyance of the dominant tenement (Interp. 186), yet mere "reputed" or *quasi* easements did not, before 1882, pass without express words. The words "with all ways thereto appurtenant" were not sufficient; and accordingly any well-drawn form of general words comprised not only rights, easements, and appur-

(*s*) See further as to the nature of prescription, *Angus* v. *Dalton*, 3 Q. B. D. 85, at pp. 90, 103, 104; S. C. 4 Q. B. D. 162, and 6 App. Cas. 740, at p. 818; Shelford, R. P. Stat., 21.

(*t*) Leake, Uses and Prof. 560. It should be noted that a right to take water from the land of another is not a profit *à prendre* but an easement; *ibid.* 562; *Race* v. *Ward*, 4 E. & B. 702.

(*u*) Leake, Uses and Prof. 310; see per Fry, J., *Bolton* v. *Bolton*, 11 Ch. D. at p. 970.

tenances strictly so called, but also those which belonged by reputation to the property or were enjoyed therewith. (See form in Stud. Prec. 129.) And the "general words" implied (in conveyances after 1882) by s. 6 of the C. A. 1881, include "easements, rights, and advantages appertaining or reputed to appertain to the land, or *at the time of conveyance* demised, occupied, or enjoyed with, or reputed or known as part or parcel of, or appurtenant to, the land, or any part thereof."

If the owner of two closes A. and B. habitually uses some right over B. in respect of A., which if A. and B. belonged to different persons would be an easement, and then conveys A., the question whether the right passes depends partly upon whether it be continuous or discontinuous, apparent or non-apparent, and partly upon whether its user is reasonably necessary for the enjoyment of the land purchased; and therefore, if it is intended to pass, it should be expressly mentioned in the conveyance. (See *Bayley* v. *G. W. Ry. Co.*, 26 Ch. D. 434; Interp. Rule 52, p. 189; M. L. R. P. 353.) An equitable right in the nature of an easement (*Angus* v. *Dalton*, 6 App. Cas. at p. 782) would probably pass by the conveyance of the dominant tenement; but it is safer to mention it.

estate (*x*).

In deeds prior to 1882 the "all estate" clause follows the general words (see forms in Stud. Prec. 2 n. (*d*) and 129). This, though invariably inserted, except in appointments, wills, codicils, and in demises for years, was useless. As to the effect of the clause when a conveying party had an interest in the property not apparent on the face of the conveyance, see *Drew* v. *Lord Norbury*, 3 J. & L. 267, and *Neame* v. *Moorsom*, L. R. 3 Eq. 91.

The clause is now always omitted in reliance on the C. A. 1881, s. 63, which provides that every conveyance (since 1881) shall pass "all the estate, right, title, interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed . . . or which they

(*x*) As to the construction of the "all estate clause," see Interp. p. 204.

respectively have power to convey in, to, or on the same," unless a contrary intention is expressed in the conveyance. The context of the conveyance may sufficiently express "the contrary intention," as in the case of a lease for years by a person seised in fee.

If any exceptions are intended to be made out of the property assured, they follow the "all estate" clause.

The distinction between exceptions and reservations, which are constantly confounded, is the following. (Shep. Touch. 78—80.)

Exception.

An exception is a clause whereby the vendor excepts something out of the thing granted (*y*). It follows that the thing excepted must be in existence at the time of the conveyance as part of the thing granted.

Reservation.

A reservation is a clause whereby the vendor reserves some new thing to himself out of the thing granted. It follows that the thing reserved is not in existence at the time the grant is made (*z*). See *post*, p. 249.

Thus a grant of "all my lands in Essex, except my manor of Dale" (Dale being in Essex) is an example of an exception (*a*). A grant of land "rendering" or "yielding" a rose yearly or a rent quarterly, is an example of a reservation. A reservation must take effect out of a corporeal hereditament, so that a distress can be taken in case it be not rendered; but it can be reserved out of a remainder or reversion in corporeal hereditaments, for, although no distress can be made during the continuance of the particular estate, distress can be made for all arrears on its determination.

Habendum and tenendum (*b*).

8. The clause beginning "to have and to hold," is the habendum and tenendum combined, and is generally called

(*y*) Co. Lit. 47 *a*; *Saunders' Case*, 5 Rep. 12 *a*. As to the construction of an exception, see *Wiltshire* v. *James*, Dy. 58 *b*; *Bullen* v. *Denning*, 5 B. & C. 850; *Doe* d. *Douglas* v. *Lock*, 2 A. & E. 705, at p. 743.

(*z*) Co. Lit. 47 *a*.

(*a*) So a conveyance of lands "except and reserved the coals in the lands"; *Cardigan* v. *Armitage*, 2 B. & C. 197 (see at pp. 206, 207).

(*b*) As to the construction of the habendum, see Interp. 210. As to the form, see Stud. Prec. *passim*; 1 K. & E. 401.

the habendum. In modern deeds the words "to have and" are often omitted. The tenendum was of use before the passing of the Statute of *Quia Emptores* to state whether the purchaser was to hold of the vendor or of his lord; but it is now useless. The effect of the whole clause is to mark out the estate or amount of interest taken by the purchaser, as "to A. and his heirs." If the conveyance stopped here, it would take effect at Common Law; if there was a consideration, the purchaser would be entitled to the use; and if there was no consideration, there would be an implied, or as it is called, a resulting use to the grantor. But the invariable practice is to declare uses on A.'s seisin. If the uses so declared do not exhaust the whole of A.'s seisin, there is (*pro tanto*) a resulting use for the grantor (*c*).

Formerly the principal heads of the parcels were usually repeated in the habendum, as "all those manors, lordships, or reputed manors or lordships, messuages, farms, lands, and hereditaments, and all other the premises hereinbefore expressed to be hereby granted;" where the words "all other, &c.," refer to anything passing under the general words, and would pass any head of the parcels which had been accidentally omitted in the prior enumeration; but the modern plan is to say "the said premises" or "the same" only.

When the conveyance is made subject to or free from estates or incumbrances, they should be noted in the habendum; as, for instance, "to hold unto the said ——, his heirs and assigns, subject to an indenture of lease, dated, &c., whereby the same premises were demised to ——, his executors, administrators, and assigns for a term of —— years from the —— day of ——, at a yearly rent of £——;" or "to hold the said hereditaments unto the said ——, free from all right or equity of redemption under the said recited indenture of mortgage." (See other examples, 1 K. & E. 401 *et seq.*; Stud. Prec. 43, 51.)

Where the conveyance merely operates as the declaration

(*c*) Interp. 287.

of the use, no habendum is inserted, the Common Law seisin is already vested in some one, and the sole object of the conveyance is to state to what uses he is to hold the land.

Limitation in fee simple.

In deeds before 1882 it was necessary in a limitation to A. in fee simple to use the words "A. and his heirs," or "A., his heirs and assigns." A limitation to "A. and his heir" (in the singular), to "A. *or* his heirs," or "to A. in fee simple," gave to A. an estate for his own life only (*d*). But in deeds since 1881, it is sufficient to say, "to A. in fee simple." (See the C. A. 1881, s. 51.)

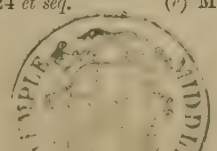
To corporations.

The proper form of limitation in fee simple to A., a corporation sole, is "to A. and his successors;" to B., a corporation aggregate, is "to B.," or "to B. and their assigns" (*e*); but by a common inaccuracy, which has received the sanction of Parliament in the Lands Clauses Consolidation Act, 1845, the words "and their successors" are often used in the latter case.

Dower Uses.

9. This appears to be a proper place for giving some explanation of the "uses to bar dower." (See the form in Stud. Prec. 143.) If at any time during coverture a husband, married on or before 1st January, 1834, is solely seised of any estate of inheritance in lands which any issue that he might have by his wife could possibly inherit, she becomes entitled on his death (whether in fact he had such issue or not) to have an equal third part of the lands allotted to her, and to enjoy them during her life. This right of the widow is called dower (see M. L. R. P. 135 *et seq.*). If the right has once attached, it cannot be defeated by any conveyance or act of the husband alone. Before 1834 it could only be released by means of a fine, in which the wife joined, or by a recovery in which she was vouched. After 1833 it can only be released by a deed made by the wife with the concurrence of her husband, and acknowledged by her pursuant to the Fines and Recoveries Act, 1833 (3 & 4 Wm. 4, c. 74, s. 77).

(*d*) See Interp. 224 *et seq.* (*e*) M. L. R. P. 84; Interp. 226.



Various plans were adopted to evade the law; the earliest was to take a conveyance of any lands which the husband purchased to himself and a trustee. Then the husband was not solely seised so long as the trustee lived, and therefore, if he predeceased the trustee, dower never attached. The disadvantages were that, if the trustee died before the husband, the latter became solely seised and dower attached; while, if the trustee survived, the legal estate remained in him and had to be reconveyed; and the husband could not make a conveyance during his lifetime without the trustee joining in it.

The next plan adopted was to limit an estate to the use of the husband for life, with remainder, after the determination of that estate by any means in his lifetime, to a trustee and his heirs during the husband's life, in trust for the husband, with remainder to the husband in fee. In this scheme the husband never becomes seised of an estate of inheritance; for, though he has the inheritance, it is in remainder after his own death; and the life interest of the husband is prevented from merging in this remainder by the interposed estate of the trustee. Supposing that, during the husband's life, his estate becomes forfeited, then the trustee's legal estate vests in possession during the husband's life. The husband has in himself the whole beneficial interest; but, if he attempts to sell, part of the legal estate is outstanding in the trustee, who has to join in the conveyance. (*Collard* v. *Roe*, 4 De G. & J. 525.) In order to obviate the necessity of his joining, the plan was adopted of giving the husband a power of appointment overriding all these limitations. (Stud. Prec. 144.)

The reader will remember (*ante*, p. 9) that it was not necessary for a declaration of use to be made simultaneously with the raising of the seisin to feed the uses, or, in other words, with some person becoming seised to the uses. Indeed, from the nature of the case, the uses declared on a fine or feoffment must have been declared before or after the fine was levied or the feoffment made; and sometimes,

instead of declaring all the uses at the same time, liberty was reserved by the instrument declaring the uses for some person to declare uses in substitution for those then declared. This liberty was called a power, or power of appointment. The uses when declared were fed by the original seisin. The effect then of giving to a purchaser a power of appointment paramount to all the limitations in the deed was to enable him to declare a use in favour of any one else. He might declare the uses in favour of whomsoever he chose, and such person immediately took the legal estate, the use being fed from the old seisin. It was, however, the practice for a husband entitled by virtue of the common uses to bar dower (under which he had an estate or estates as well as a power to appoint) not only to convey by appointment, but also to convey by some other method, such as lease and release, or bargain and sale, so as to convey all his estate.

The only case in which uses to bar dower should be inserted in a purchase deed is where the purchaser was married on or before 1st January, 1834, to a wife still living, a case which obviously can hardly now occur. Where the purchaser was married after that day, the dower uses do not bar his wife's dower (*f*), though a declaration that his widow shall not be entitled to dower does bar it (*g*); but as, by virtue of the Dower Act, 1833 (3 & 4 Will. 4, c. 105), he can dispose of his land by deed or will free from her dower, this declaration should never be inserted, for, if he die intestate, his widow appears to be entitled, morally, to as much consideration as his heir.

Covenants for title.

10. The covenants for title are of considerable, though, perhaps, of over-rated importance to the purchaser. Disputes constantly arise as to what covenants shall be entered into when the vendor is not absolute owner. The solicitor should always be careful to see that the proper covenants,

(*f*) *Fry* v. *Noble*, 7 De G. M. & G. 687.

(*g*) The Dower Act, 1833 (3 & 4 Will. 4, c. 105), ss. 6, 7. See Shelford, R. P. Stat. 340.

whether expressed, or implied by virtue of the C. A. 1881, are inserted in the draft, for he may render himself personally liable in damages towards his client if, when acting for the vendor, he allows him to enter into unusual covenants (*Stannard* v. *Ullithorne*, 10 Bing. 491); or if, when acting for a purchaser, he does not insist on the vendor's entering into those that are usual.

Express covenants.

The student should render himself familiar with the express covenants for title (*h*), though they are now rarely if ever made use of. When they are inserted, the purchaser is entitled to the four following covenants to be entered into by the vendor; (1) for right to convey, (2) for quiet enjoyment, (3) free from incumbrances, and (4) for further assurance. The vendor has a right to qualify them so that they shall not extend to the acts and omissions of the whole world, but only to the acts and omissions of such of the persons under whom he claims as have not themselves entered into proper covenants, *i.e.*, the persons through whom he claims who took by descent or devise, or as they are generally called, "his ancestors and testators," and persons claiming under them. It follows that a vendor, who has received the property by devise or inheritance from his father who was a purchaser for value, covenants against the acts and omissions of himself and his father and persons claiming under them, the purchaser being entitled, as "an assign," to the benefit of the covenants entered into with the father on his purchase (see M. L. R. P. 377, note (*i*)). Formerly, these four covenants were preceded by a covenant that the vendor was seised in fee, but this is now always omitted.

The covenant for right to convey is qualified by the words, "notwithstanding anything by [*the vendor and those persons whose acts and omissions are intended to be guarded against*] done, omitted, or knowingly suffered;" where the word "done" has reference to positive acts of commission,

(*h*) As to the construction, see Interp. 473. As to the form of the covenants, see Stud. Prec. 3 n. (*a*).

as the execution of a deed, the creation of a charge; "omitted" has reference to such matters as the omission to execute a deed with the required formalities, or the omission to bar an estate tail; "suffered" has reference to bankruptcy, or some wrongdoer having been allowed to take possession. It should be noticed, that if this covenant is ever broken, it is broken at the moment of executing the conveyance; and also that the qualifying words prevent the covenants from being an absolute warranty of title; see *David* v. *Sabin* (1893), 1 Ch. 523, at pp. 531, 532; and M. L. R. P. 377.

The covenant for quiet enjoyment is "without interruption or disturbance by the covenantor, or any person claiming through or in trust for him, or any of his ancestors or testators." The word "lawful" is sometimes inserted before interruption, but it is unnecessary, as the covenant would not be held to apply to an unlawful disturbance (*i*).

The covenants against incumbrances and for further assurance require no particular remarks. It has been doubted whether the covenant against incumbrances extends to those incumbrances of which the purchaser has notice (Interp. 481); but it is now decided that it does (*k*).

Where there was a grantee to uses, the covenants were entered into with him as having the legal estate; they would then run with the land for the benefit of the persons in whom the statute executes the uses.

Where trustees or mortgagees concur in the conveyance, the covenant may run, "that the said [*vendor*], and the said [*trustees*], now have power, &c.," or "that the said [*vendor*] with the concurrence of the said [*trustees*] now has power, &c."

Implied covenants.

The C. A. 1881 (s. 7) contains provisions for implying covenants for title and further assurance by the insertion of the appropriate statutory words in a conveyance by deed, not being a lease at a rent, and not being a

(*i*) Interp 483.

(*k*) *Page* v. *Midland Railway Co.* (1894), 1 Ch. 11.

customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land (s. 7, sub-s. 5).

In the case of a conveyance for *value* the usual covenants are implied by a person "who conveys and is expressed to convey, *as beneficial owner*" (sub-s. 1 A.), "as regards the subject-matter expressed to be conveyed by him." It should be noted that the covenants are not implied by conveying "as beneficial owner" unless the conveyance be for valuable consideration. C. A. 1881, s. 7, sub-s. (1), (A.), (B.).

In order to imply covenants by A. he must expressly convey "as beneficial owner," as follows: "The said A. as beneficial owner doth hereby grant, &c." In this case, A.'s covenants relate to all the property conveyed. On the other hand, if the deed contains merely a recital that A. is seised in fee, or that he is beneficial owner, but in the operative part he does not convey "as beneficial owner," as, for instance, if the words are, "the said A. doth hereby, &c.," no covenants by A. are implied. But if A. conveys by the direction of B. "directing as beneficial owner," covenants for title by B. are implied. C. A. 1881, s. 7, sub-s. (2).

The covenants by A. relate only to the property that A. is expressed to convey "as beneficial owner;" and, even if A. has no interest in the property, yet if he conveys "as beneficial owner," covenants by him will be implied. Thus, if the recitals show that A. is seised in fee, and the operative part runs, "the said A. doth hereby grant and the said B. as beneficial owner doth hereby grant and confirm, &c.," no covenants by A. are implied, but covenants by B. are implied. This affords a convenient method of restricting the covenants of the several conveying parties in cases where it is intended so to do. Thus, if the words are, "the said A. and B., each of them conveying as beneficial owner of one undivided moiety of the hereditaments hereby assured, do respectively hereby grant," the

covenants of A. and B. respectively relate to one moiety of the property only. Again, if the words are, "the said A. as beneficial owner, as to the estate for his life in the hereditaments hereby assured, and the said B. as beneficial owner as to the reversion in fee simple expectant on the life estate of the said A., do hereby respectively grant," the covenants by A. relate to his life estate only, and those by B. to the reversion in fee only (*l*). In cases where the interests of the conveying parties are complicated and sufficiently appear by the recitals, the words may be, "the said A., B., and C., each of them conveying as beneficial owner of the respective share, estate, or interest in the hereditaments hereby assured to which he is entitled as hereinbefore is recited, do respectively hereby grant," where the covenants by each party relate only to the share, &c., to which he is recited to be entitled.

The covenants for right to convey and quiet enjoyment by the person expressed to convey "as beneficial owner" in a conveyance for value, not being a mortgage, extend only to the acts and omissions of himself, and those of "any person through whom he derives title otherwise than by purchase for value" (where "purchase for value" does not include a marriage settlement), *i.e.*, they extend to the acts and omissions of himself and every ancestor, testator, or settlor through whom he derives title since the last conveyance for value other than a marriage settlement. The words "any person, &c.," have given rise to a doubt whether the covenant does not extend to the acts of all the predecessors in title not being purchasers for value; but the student will observe that a predecessor in title prior to the last conveyance for value is a person through whom the person conveying derives title through the subsequent purchase for value, so that the doubt is ill founded.

The first of the implied covenants is that the person conveying as beneficial owner, "together with every other

(*l*) See form of proviso restricting the liability of a tenant for life under his implied covenants, in Stud. Prec. 13.

person, if any, conveying by his direction," can convey. These words present no difficulty; but occasionally, at the request of the vendor, some person may concur who cannot properly be said to convey "by his direction," as in the case of a mortgagee who is not fully paid off, and it would be extremely foolish for such a person to refuse to convey "by the direction" of the vendor; but if he should do so, he may be made to convey "at the request of A. and for the purpose only of implying covenants by A. for title and further assurance, by the direction also of A. directing as beneficial owner."

The student who has mastered the ordinary express covenants for title, &c., will have little difficulty in understanding the form of implied covenants given in the Act, s. 7 (1) A.

Married woman.

If a married woman conveys expressly "as beneficial owner," the implied covenants bind her separate estate present and future (*m*). If the married woman conveys "as beneficial owner," and her husband also conveys "as beneficial owner," then by the C. A. 1881, s. 7, sub-s. 3, the married woman is deemed to convey "by the direction of the husband directing as beneficial owner," and in addition to the covenants implied by the wife's conveying "as beneficial owner," and by the husband conveying "as beneficial owner," a covenant is implied by the husband in the same terms as the covenant by the wife. The result is that three covenants are implied, *first*, by the wife against the acts of herself, her ancestors, and testators; *second*, by the husband against the acts of himself, his ancestors and testators; *third*, by the husband against the acts of the wife, her ancestors and testators. If the property belongs to the wife, so that the husband's interest (if any) is derived through her, the second covenant includes the third. It will make it clearer to take an example: Suppose that the wife inherited the property from her father; as the property

(*m*) See the M. W. P. A. 1882 (45 & 46 Vict. c. 75), s. 1 (3), and the M. W. P. A. 1893 (56 & 57 Vict. c. 63).

belongs to the wife, the only interest that the husband takes is derived through her, and the covenants become covenants by the wife against the acts of herself and her father, covenants by the husband against the acts of himself, his wife, and her father, and covenants by the husband against the acts of his wife and her father. As to the nature of the interest that a husband takes in his wife's property, see *post*, Chap. XI.

Covenants by trustees or mortgagees.

Trustees or mortgagees who are conveying parties only covenant that they respectively have not incumbered.

The usual covenant against incumbrances (*i.e.*, only incumbrances created by the acts of the person who conveys) is implied in any conveyance by a person who conveys and is expressed to convey "as trustee" or "as mortgagee," "as personal representative" of a deceased person, or "as committee of a lunatic so found by inquisition," or "under an order of the High Court of Justice." See the C. A. 1881, s. 7 (1) F.

In some cases, as, for example, where an annuitant concurs in the conveyance, none of the statutory expressions are strictly appropriate. There would, however, be no impropriety in using any of the statutory words for the purpose of implying the covenant by the annuitants; or a proviso may be inserted "that the same covenant shall be deemed to be implied by these presents on the part of the said A. (the annuitant) as if he had been expressed to convey as trustee."

With whom the statutory covenants for title, &c., are implied.

The covenants implied under C. A. 1881, s. 7, by conveying "as beneficial owner," or "as mortgagee," &c., are made with the person to whom the conveyance is made; or in a conveyance to joint tenants with the persons jointly to whom the conveyance is made, or in a conveyance to tenants in common with each of the persons to whom the conveyance is made (see sub-s. 1). By sub-s. 6 the benefit of the implied covenant is annexed to the estate of the implied covenantee, and may be enforced by any person claiming under him; the effect being the same as if the

covenant had, in the case of freeholds of inheritance, been made with the implied covenantee, "his heirs and assigns."

In a conveyance to a grantee to uses the implied covenants will be with the grantee to uses, and will run with the land for the benefit of the persons in whom the statute executes the use.

Construction of statutory covenants.

Lastly, it should be observed that, in the construction of the implied covenants, words importing the singular or plural number, or the masculine gender, are to be read as also importing the singular or plural number, or as extending to females. See the C. A. 1881, s. 64.

Although it is the settled practice of conveyancers on sales by trustees to make all the beneficiaries who have a substantial interest in the proceeds of sale enter into covenants for title to the extent of that interest, it is the rule that, on sales by the Court of real estate vested in trustees, if the trustees are competent to give a discharge for the purchase money, the beneficiaries are not to be required to enter into any covenants (*n*). The question as to the form of the covenants to be entered into by a tenant for life on a sale by trustees with his consent, has given rise to some discussion. Notwithstanding the decision of Lord Romilly in *Earl Poulett* v. *Hood*, L. R. 5 Eq. 115, the practice now appears to be settled that, although the tenant for life must covenant in respect of his life estate, yet, as regards the reversion, in which he has no beneficial interest, his liability under the covenants should be restricted to the acts of himself and persons claiming under him. (Dart, V. & P. 620. See form 1 K. & E. 419.)

Covenants by tenants for life.

Rights as to deeds.

The right to possess title deeds must be carefully distinguished from the right to have them produced when they are in the possession of another person (*o*).

Right to possession of title deeds.

*Primâ facie* the person having the first estate of freehold

(*n*) *Cottrell* v. *Cottrell*, L. R. 2 Eq. 330.

(*o*) See articles on the right to possess and the right to production of deeds in 33 Sol. J. 655, &c., where the cases are collected. See also Leake, Uses and Prof. ch. ix. pp. 124 *et seq.*

is entitled to the possession of the title deeds. Accordingly the legal tenant for life (and at the present day an equitable tenant for life except where the trustees have active duties to perform) (*p*) is (with some exceptions) entitled to hold them; but the Court will, in some cases, direct him to deposit them in Court, as (1) where he has been guilty of misconduct, so that the safety of the deeds is endangered; (2) where the rights of others intervene, and it becomes necessary for the Court to take charge of the deeds in order to administer the property (*q*).

If one of several coparceners, tenants in common, or joint tenants, or the owner of one of several parcels of land held under a common title, obtains possession of the deeds, he is entitled to retain them.

Where a man sold and conveyed land to another in fee simple without warranty of title, all the deeds belonged at Common Law to the purchaser unless the vendor retained part of the property (*r*). This is embodied in the V. & P. A. 1874 (s. 2), which provides that "where the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents." It should be observed that a mortgagee in fee was not entitled to the deeds, unless the mortgage contained a grant of them, or they were handed over to him (*s*). But the law is now altered by the C. A. 1881, s. 21 (7), which provides that, at any time after the statutory power of sale has become exercisable, the mortgagee may demand and recover from any person who has not priority over the mortgage, any

(*p*) *Re Wythes* (1893), 2 Ch. 369; *Garner* v. *Hannyngton*, 22 Beav. 630; *Evans* v. *Bicknell*, 6 Ves. 174; *Re Burnaby*, 42 Ch. D. 621; *Re Newen* (1894), 2 Ch. 297.

(*q*) *Leathes* v. *Leathes*, 5 Ch. D. at p. 223; *Ex p. Rogers*, 26 Ch. D. 31.

(*r*) *Lord Buckhurst's Case*, 1 Rep. 1 *a*; *Wright* v. *Robotham*, 33 Ch. D. 106. A vendor is bound to obtain at his own expense all deeds which ought to be delivered to the purchaser. *Re Duthy and Jesson* (1898), 1 Ch. 419.

(*s*) *Yea* v. *Field*, 2 T. R. 708; *Davies* v. *Vernon*, 6 Q. B. 443 but see *Manners* v. *Mew*, 29 Ch. D. 725; Ashburner on Mortgages, 179.

deeds which a purchaser under the power of sale would be entitled to demand and recover from the mortgagee.

A termor or annuitant is not entitled to the deeds relating to the freehold (*t*), and on the determination of a lease, the reversioner is not entitled to have the lease delivered up to him (*u*), and an expired lease is not a muniment of title (*Elworthy* v. *Sandford*, 34 L. J., Ex. 42). Where before the Judicature Acts there was a conflict as to priority between incumbrancers, and one of them claiming to be a purchaser for value without notice obtained the deeds, and it was afterwards decided that some other person had priority, the Court of Chancery would not take the deeds from him (*x*); but it is otherwise under the Judicature Acts (*Manners* v. *Mew*, 29 Ch. D. 725, 732). Thus where a person has obtained the deeds by virtue of a supposed title derived from a former holder of them, and it turns out that the former holder had no title to the property, then if a third person establishes his title to the property, the Court is bound to give effect to the legal right of such third person, and to order the deeds to be given up to him (*y*).

Right to production of title deeds.

In some cases, even in the absence of an express contract, a person who is owner of an estate in the land has an equitable right to production of the deeds. Such cases are determined on the principle that a person has a right to the production of deeds if they affirmatively prove his title; otherwise he has no such right (*z*).

A vested remainderman (*a*) is, but a contingent remain-

(*t*) *Whitfield* v. *Fausset*, 1 Ves. sen. 387; *Harper* v. *Faulder*, 4 Madd. 129; *Webb* v. *Lymington*, 1 Eden. 8; 1 Dick. 298; 8 Ves. 322; *Hotham* v. *Somerville*, 5 Beav. 360.

(*u*) *Hall* v. *Ball*, 3 Man. & G. 242.

(*x*) *Heath* v. *Crealock*, L. R. 10 Ch. at p. 33; *Waldy* v. *Gray*, L. R. 20 Eq. 238; *Thorpe* v. *Holdsworth*, L. R. 7 Eq. 139; *Hunt* v. *Elmes*, 2 De G. F. & J. 578.

(*y*) *Re Cooper*, *Cooper* v. *Vesey*, 20 Ch. D. 611; *Cottam* v. *E. C. Ry. Co.*, 1 J. & H. 243; *Re Ingham* (1893), 1 Ch. 352.

(*z*) *Compton* v. *Grey*, 1 Y. & J. at p. 158; *Pickering* v. *Noyes*, 1 B. & C. 262; *Bolton* v. *Corporation of Liverpool*, 1 Myl. & K. at p. 91.

(*a*) *Reeves* v. *Reeves*, 9 Mod. 128; *Davis* v. *Dysart*, 20 Beav. 405; *Pennell* v. *Dysart*, 27 Beav. 542.

derman (*b*) is not entitled to production of deeds in the possession of the tenant for life for the purpose of enabling him to deal with his reversionary interest.

One of several tenants in common (*c*), or one of several persons holding different lands under the same title (*d*), has an equitable right to production of the common title deeds. Where a man purchases part of the lands to which title deeds relate and the title deeds remain with the vendor, the purchaser has an equitable right to production of the deeds unless there is a contract, express or implied, to the contrary (*e*). Where a mortgage was made before 1882, and the deeds were handed over to the mortgagee, the mortgagor had no right to see them without paying the mortgagee his principal, interest, and costs (*f*); but, as regards mortgages made after 1881, this rule has been altered by the C. A. 1881 (s. 16), which enables the mortgagor, while his right to redeem subsists, at reasonable times and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title in the possession of the mortgagee.

Covenants for production and safe custody.

It is not, and never has been, the practice for the purchaser to be contented with his equitable right to the production of title deeds retained by the vendor. On a sale before 1882, the vendor covenanted that he would, when required, and at the cost of the purchaser, unless prevented by fire, &c., produce the deeds not handed to the purchaser, and give copies of them to the persons entitled to the land sold, and that he would in the

(*b*) *Noel* v. *Ward*, 1 Madd. 322.

(*c*) *Lambert* v. *Rogers*, 2 Mer. at p. 490; *Edmonds* v. *Foley*, 30 Beav. 282.

(*d*) *Hercy* v. *Ferrers*, 4 Beav. 97; *Shore* v. *Collett*, G. Coop. 234; *Att.-Gen.* v. *Lambe*, 3 Y. & C., Ex. 162; *Att.-Gen. of the Prince of Wales* v. *Lambe*, 11 Beav. 213; *Riccard* v. *Inclosure Commissioners*, 4 El. & Bl. 329.

(*e*) *Fain* v. *Ayers*, 2 Sim. & St. 533; *Barclay* v. *Raine*, 1 Sim. & St. 449; Sugd. V. & P. 472.

(*f*) *Chichester* v. *Donegall*, L. R. 5 Ch. 497, 520; Leake, Uses and Prof. 131.

meantime keep them safe (see forms in 1 K. & E. 421). These two covenants are generally called the "covenant for production," but in strictness the first should be called the covenant for production, the latter the covenant for safe custody. Sometimes, by special agreement, the vendor was allowed to qualify the covenants by inserting a proviso avoiding the covenant if he delivered the deeds to any person lawfully entitled to the custody thereof, and, at his own expense, procured such person to execute and deliver a similar covenant to the purchaser. It may be remarked that in practice this proviso was rather to the advantage of the purchaser, as it was likely to enable him to trace the deeds on their changing hands.

Fiduciary vendors.

If the covenants for production and safe custody were entered into by fiduciary vendors, the usual form of covenant was altered, so as to prevent them from incurring any personal liability under the covenants. For this purpose each of them covenanted separately, so as to bind himself and his representatives personally, only while having the actual custody of the muniments of title, and so far as possible to bind them in the hands of other people, to whom they might be delivered. Some practitioners omitted in this case the covenant for safe custody. See the propriety of this discussed in W. B. & C. 48.

Whenever it was practicable, it was a wise precaution to have notice of the covenant indorsed on the leading title deeds retained by the vendor. This prevented any difficulty in case it turned out that the covenants had been entered into by some person who had not the legal estate, so that they did not run with the land; for the effect of the indorsed notice was to bind the deeds in Equity.

Statutory provisions for production and safe custody.

The practice of giving covenants for production and safe custody is generally superseded, since 1881, by the provisions of the C. A. 1881, s. 9, which substitutes an acknowledgment of the right to production and delivery of documents for the covenant for production, and an undertaking for safe custody for the covenant for safe custody

(as in Stud. Prec. p. 6). Neither the acknowledgment nor the undertaking has any statutory effect unless it is given by the person who "retains" the documents, *i.e.*, has them in his possession. This is a point to be attended to in practice, as a person who gives an acknowledgment or undertaking without having the documents in his possession may impose on himself an onerous liability; while the person to whom it is given would not have the advantages arising from the statutory effect of an acknowledgment or undertaking. The old form of covenant should therefore be used where a vendor has to covenant for the production of documents in the hands of another person, as a trustee or mortgagee. It should be used also if the documents relate to foreign land, or are retained by a person having a foreign domicile, as in either of these cases the Act may be held not to apply.

Both the acknowledgment and the undertaking bind the documents in the possession or under the control of the holder thereof for the time being; and the obligations created by the acknowledgment or undertaking have to be performed by each holder so long as "he has possession or control of" the documents: thus assimilating his liability to that of a trustee entering into the usual restricted covenant.

The obligations imposed by an acknowledgment are to be performed at the request in writing of the person to whom it is given, or of any person claiming under him other than a lessee at a rent. The obligations are, at the request and costs of the persons entitled to the benefit of the acknowledgment, to produce the documents for inspection and comparison by him with abstracts or copies, and for proving or supporting his title, and to deliver to him copies of or extracts from the documents. The provisions as to costs render it proper, in cases where an acknowledgment has to be given to a mortgagee, to make express provision for his costs. See the form 2 K. & E. 60.

The obligation imposed by the "undertaking for safe custody" is to keep the documents "safe, whole, uncan-

celled and undefaced, unless prevented from so doing by fire or other inevitable accident."

Practice as to production.

The practice of some of the leading solicitors in London, in acting on covenants for production and statutory acknowledgments, is merely to write to the solicitors who hold the deeds, stating that they desire to inspect them on behalf of A. B., who claims under such and such a deed, at the same time offering to pay the costs of the inspection. An appointment to inspect the deeds is given as a matter of course : and the actual production of the deed containing the covenant for production or acknowledgment is dispensed with, unless there are suspicious circumstances.

The question sometimes arises whether it is desirable to insert the covenant for production in the conveyance itself, or to take it in a separate deed.

Formerly it was the practice, as a general rule, to take the covenant for production by a separate deed. For, if the covenant was in the conveyance, it was notice to any subsequent purchaser of the deeds mentioned in it, and this was inconvenient, as after a lapse of time it might become difficult to find them; and in that case the fact of the covenant being in the conveyance might prevent the purchaser from being able to sell without restrictive conditions. This reason does not exist since the C. A. 1881, s. 3 (3), which precludes any requisition in respect of a document prior to the root of title; and it is now the usual practice to insert the statutory acknowledgment and undertaking in the conveyance. It appears, however, that, unless the schedule of documents is short, so that the expense of making a copy of it is small, it is better to have the acknowledgment in a separate instrument, which may be under hand only on a 6*d.* agreement stamp, so as to enable the person inspecting the deeds to take it with him, thus avoiding the expense of making a copy of it. This is of special importance if there is likely to be any objection to the conveyance itself being taken away from the office where it is deposited.

Building estate.

Occasionally, where an estate is laid out for building, covenants restricting the manner of dealing with the property sold and that retained by the vendor, as, for instance, that no house of less than a specified value shall be erected, or covenants for the maintenance of roads, sewers, &c., are inserted in the conveyance (*g*).

Covenants —binding heirs and assigns.

It is no longer necessary for the covenantor to covenant for himself "and his heirs" according to the old practice, for, by the C. A. s. 59, every covenant, though not expressed to bind the heirs, binds the heirs and real estate as well as the executors and administrators and personal estate of the covenantor; but he should expressly covenant for "himself and his assigns," as some of the covenants may not bind the assigns unless they are expressly named. It was formerly supposed that, whether the assigns were named or not, any assign taking with notice was bound to perform the covenants (*Tulk* v. *Moxhay*, 2 Ph. 774); but it is now decided that this is only true as to negative covenants, *i.e.*, covenants not to do something, which can be enforced by an injunction (*h*). The performance of the covenants, whether positive or negative, is often secured by a condition for re-entry on breach of covenant (see the effect of this, and as to the power of the Court to relieve against forfeiture, *post*, p. 235 *et seq.*); but it appears safer, instead of inserting an absolute condition of re-entry, which may be void as tending to a perpetuity (*i*), to restrict the time during which re-entry may be made to lives in being, and twenty-one years after the death of the survivor of such lives, so as to be within the time allowed by the rules against perpetuities (see *L. & S. W. Ry. Co.* v. *Gomm*, 20 Ch. D. 562; *Mackenzie* v. *Childers*, 43 Ch. D. 265 at p. 279). Notwith-

Assigns of covenantee.

(*g*) See 1 K. & E. 294 note; and as to the rights and liabilities created by such covenants as between the several purchasers, *Re Birmingham and District Land Co. and Allday* (1893), 1 Ch. 342, and the cases there cited by Stirling, J.

(*h*) *Haywood* v. *The Brunswick Building Society*, 8 Q. B. D. 403; *L. & S. W. Ry. Co.* v. *Gomm*, 20 Ch. D. 562; *Austerberry* v. *Corp. of Oldham*, 29 Ch. D. 750.

(*i*) *Dunn* v. *Flood*, 25 Ch. D. 629

standing the C. A. 1881, s. 58 (1), which provides that "a covenant *relating to land of inheritance* . . . shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed," it appears proper to mention the "assigns" of the covenantee in cases where they are to have the benefit of the covenants. Care should also be taken to define the property for whose benefit the covenants are imposed (*Renals* v. *Cowlishaw*, 9 Ch. D. 125; 11 Ch. D. 866), by covenanting with "A., his heirs and assigns (*k*), the owner or owners for the time being of, &c." See further as to restrictive covenants, M. L. R. P. 168, note (*p*).

Reversion. Where the property intended to be conveyed is reversionary, the recitals should show the origin and exact nature of the interest intended to be conveyed.

As remainders and reversions always lay in grant, a deed of grant was the appropriate mode of conveyance of them. But inasmuch as before the Real Property Act, 1845 (8 & 9 Vict. c. 106), came into operation, if the remainder or reversion became an estate in possession before the execution of the deed, the land would not pass by a grant, it became the practice to convey a remainder or reversion by some conveyance, such as a lease and release or a bargain and sale inrolled, which would pass freeholds in possession. In a conveyance of a remainder or reversion it is the practice to describe the parcels as if the estate were in possession, and then in the habendum to show that it is subject to the preceding estates (see form in Stud. Prec. 42). This practice arises from the doctrine, held by Preston (2 Abstracts, 88), but doubted by Davidson (1 Dav. Prec. 67), that, if the remainder or reversion is described as such, and there is a material error in the description, it will not pass, because there is no such thing as that described in the parcels; whereas, if the land is described in the parcels as if

(*k*) See as to who are "assigns" within such a covenant, *Everett* v. *Remington* (1892), 3 Ch. 148.

it were in possession, the effect of an error in the habendum is not to prevent it from passing, but only to introduce some difficulty in ascertaining what estate the purchaser is to take. It is hardly necessary to observe that in such cases the draftsman must be extremely careful to show distinctly what estate the purchaser is intended to take. This remark is of very great importance where the vendor has more than one estate in remainder; for, as he can convey the one estate without the other, it is possible by careless conveyancing to pass the wrong estate.

Death duties.

The conveyance of a reversion or remainder should contain a covenant by either the vendor or the purchaser, as may be agreed, for payment of the death duties which will become payable when the reversion or remainder falls into possession, unless they are compounded for (1 K. & E. 429). In the absence of an agreement the purchaser of the reversion must pay the duty (*l*).

Purchase of reversion at under value.

Till lately, unless the purchaser of a reversionary interest could show that he had given full value for it, the purchase was liable to be set aside by the Court of Chancery; and the consequence was that reversionary interests were much depreciated in the market, as every purchaser knew that, unless he purchased by public auction, he ran the risk of a Chancery suit. The law has now been altered by the Sales of Reversions Act, 1867 (31 Vict. c. 4), by which no *bonâ fide* purchase without fraud or unfair dealing of a reversionary interest is to be set aside *merely* on the ground of under value; but the Court still affords protection to expectant heirs. (*Chesterfield* v. *Janssen*, 1 W. & T. L. C.; *Tyler* v. *Yates*, L. R. 6 Ch. 665; *O'Rorke* v. *Bolingbroke*, 2 App. Cas. 814; *Fry* v. *Lane*, 40 Ch. D. 312.)

Purchase of reversion subject to operation of S.L.A.

When a reversion in land is purchased, it should be

(*l*) *Cooper* v. *Trewby*, 28 Beav. 194; *i.e.*, where the purchase is of a reversion as such. But, where it is a purchase for an estate in possession, and title is made by the owners of life estates with the concurrence of reversioners or remaindermen, the vendors must pay the duty. See *Re Kidd and Gibbon's Contract* (1893), 1 Ch. 695; *Re Langham*, 60 L. J. Ch. 110; Dart, V. & P. 316, 667.

remembered that the powers given to the tenant for life by the S. L. A. 1882, cannot be released; and that therefore the land may be sold before the reversion falls into possession, and thus the purchaser gets money instead of land. In a case where the purchaser of the reversion wished to enjoy the land itself, and the tenant for life threatened to sell it to a stranger, the purchaser paid a good price for the land into Court as an offer, and upon his undertaking not to withdraw his offer, the tenant for life was ordered not to sell (except by public auction), without communicating any other offer made to him and giving the purchaser two days to consider whether he would make any advance upon such other offer (*Wheelwright* v. *Walker*, W. N. 1883, 154; 31 W. R. 912). The person who had purchased the reversion could afford to give more than any one else on a sale by auction, for, if he gave more than the full value, he would only lose interest on the excess during the life of the tenant for life, because eventually he would become entitled to the capital.

Contingent interests.

The effect of the Real Property Act, 1845 (8 & 9 Vict. c. 106, s. 6), is to enable (as from the 1st October, 1845) "a contingent, an executory and a future interest, and a possibility coupled with an interest in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry (*m*), whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure," to be disposed of by deed.

"Right of entry" in this section does not include a right of entry for a forfeiture (*n*). The benefit of the right of re-entry in a lease for years is inseparably annexed to the reversion expectant on the term (*o*).

(*m*) See *Kennedy* v. *Lyell*, 15 Q. B. D. 491.

(*n*) *Hunt* v. *Remnant*, 9 Ex. 635; *Hunt* v. *Bishop*, 8 Ex. 675; *Jenkins* v. *Jones*, 9 Q. B. D. 128.

(*o*) C. A. 1881, ss. 10, 12. As to the powers of the Court to relieve the lessee in case of forfeiture, see *post*, p. 235.

In an assignment of leaseholds (*p*) the lease and the devolution of title, if any, to the vendor are recited. Where the dealings with the property since the lease are numerous, they may be recited shortly as follows: "Whereas, by virtue of divers mesne assurances, acts, and operations in the law, and events, and ultimately by an indenture, &c., the said premises comprised in the said indenture of lease have become absolutely vested in the said [*vendor*] for all the residue of the said term of —— years, subject to the rent reserved by and the covenants and conditions contained in the said lease." The parcels are generally set out in the recital of the lease and are assigned by the description of "all and singular the —— and hereditaments comprised in [or expressed to be demised] by the said recited indenture of lease." Leaseholds.

The covenants for title implied by a person assigning "as beneficial owner" are similar, *mutatis mutandis*, to those implied on a conveyance in fee, with the addition of a covenant restricted in the same manner as the covenant for right to convey (*supra*, p. 104), that the lease is good, that the rent has been paid, and that the covenants have been performed up to the time of assignment. See the C. A. 1881, s. 7, sub-s. (1), B. The purchaser also expressly covenants with the vendor to perform and observe during the residue of the term the covenants by the lessee contained in the lease, and to indemnify him against them. The effect of the former covenant is the same as if the covenants by the lessee in the lease were inserted in the assignment, *mutatis mutandis*. If the vendor is the original lessee, he is bound to his landlord to perform during the whole term his covenants in the lease (*q*); and if he is not the original lessee, he is bound to his vendor by the covenants under discussion contained in the assignment to him to perform during the whole term as from the date of that assignment the lessee's covenants in the lease; and, in either case, the liability is

(*p*) See the form in Stud. Prec. 32. As to the law of assignments, see M. L. R. P. 375.

(*q*) See M. L. R. P. 165.

one from which it is reasonable to relieve him when he parts with the property. The covenants under discussion are not inserted where there is no remaining liability on the part of the vendor after the assignment under the covenants in the lease, as for instance where it is a mortgage term at a peppercorn rent; or where he is a trustee in bankruptcy (*r*).

There is an implied covenant by each assignee to indemnify the original lessee against breaches of covenant during his own tenancy (*Moule* v. *Garrett*, L. R. 5 Ex. 132, 7 Ex. 101) (*s*).

Assignment of part of demised property.

Where part only of the property comprised in a lease is to be sold, the conveyance may be prepared in either of two different manners. An assign of part of the property is liable, during his ownership, to perform the covenants and pay the rent under the lease, and is liable to eviction if the owner of the other part commits a breach of covenant; but an under-lessee is not liable to perform the covenants or pay the rent under the head lease, though he is liable to eviction by the original lessor if the owner of the head lease commits a breach of covenant.

If, then, the purchase comprises a small part only of the property comprised in a lease, it is usually carried out by means of an under-lease, so that the purchaser shall incur no liability under the covenants comprised in the head lease. The vendor covenants with the purchaser to pay the rent, *i.e.*, the whole rent, reserved by the head lease, and to perform the covenants comprised in it, so far as they regard the land which he retains; and the purchaser enters into fresh covenants with the vendor (which should always be framed so as to comprise covenants similar to those contained in the head lease) so far as regards the property contained in the under-lease. On the other hand, where

(*r*) Dart, V. & P. 630. Unless the trustee has been prevented from disclaiming, and required to assign the lease. *Ex parte Buxton*, *In re Müller*, 15 Ch. D. 289.

(*s*) As to the liability of an equitable assign, see 1 K. & E. 495.

the property sold forms a substantial part of the property in the head lease, the conveyance is made by assignment; and the vendor and purchaser respectively covenant with each other to perform the covenants contained in the head lease so far as they relate to the property retained by or conveyed to the covenantor, and for payment of an apportioned part of the rent. There should also be a power of re-entry (restricted as to perpetuity) on breach of the covenant.

It was formerly the practice to insert a power of distress enabling each party to distrain on the part of the property belonging to the other, in respect of any costs or damages occasioned by his breach of covenant. This scheme, however, is at the present ineffectual owing to the operation of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), and the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), the former of which (s. 6) provides that any power of distress given by way of security for any debt is to be deemed a bill of sale, within the meaning of the Act, of any personal chattels which may be seized or taken under such power of distress; while the latter Act invalidates any bill of sale given as security for money, unless it be in the form prescribed by the Act, a form which an assignment of leaseholds at an apportioned rent cannot comply with (*t*).

Title to be shown on sale of leaseholds.

Formerly a vendor entering into an open contract for the sale of leaseholds was bound to show his lessor's title (*Souter* v. *Drake*, 5 B. & Ad. 992); except in some cases stated in Dart, cap. VIII. s. 3; but now he is not bound to show the title to the freehold (V. & P. A. 1874, 37 & 38 Vict. c. 78, s. 2); nor, in the case of an under-lease, the title to the leasehold reversion (C. A. 1881, s. 3 (1) ). The purchaser of a lease is to assume that it was duly granted, and the purchaser of an under-lease that it and every superior lease was duly granted, on the production in either case of the last receipt for rent before completion, unless the contrary appears. The obligation to show the lessor's title in the case of leaseholds for lives remains unchanged.

(*t*) As to bills of sale, see M. L. P. P. chap. vii.

Copyholds (*u*).

The legal estate in copyholds passes by an admittance (*x*) founded on a surrender; but a mere equitable interest can be passed by a deed. As the covenants for title form no part of the surrender, and cannot be implied in it by the C. A. 1881, it is the practice to have a separate deed containing or implying them, which may be executed either before or after the surrender. In the former case the deed is called "a covenant to surrender" (*y*). The recitals, if any, are of the vendor's title and the agreement for sale, and the operative part consists of a covenant by the vendor, "as beneficial owner," to surrender the land "to the use of [*the purchaser*] his heirs and assigns, to be holden of the lord of the manor by copy of Court Roll, according to the custom of the manor, by and under the rents, fines, suits, and services, therefor due and of right accustomed," and is followed by a declaration of trust for the purchaser till surrender. As a covenant to surrender copyholds is a conveyance within the definition contained in the C. A. 1881, s. 2 (v.), the usual covenants for title can be implied by using the words "as beneficial owner." If the deed is subsequent to the surrender, it recites the surrender and witnesses that, in consideration of the payment and receipt of the purchase money (which are stated in the usual form), the vendor covenants for title. In this case, as the deed is

(*u*) As to the law of copyholds, see M. L. R. P. chap. xii.

(*x*) Any person who has a right to be admitted can enforce it by a writ of mandamus; *Vaughan* v. *Atkins*, 5 Burr. at p. 2787; *Rex* v. *Rennett*, 2 T. R. 197; *Rex* v. *Coggan*, 6 East 431; which will be granted on his making out a *primâ facie* title. If two persons claim to be admitted, the steward has no jurisdiction to decide between them, but it is his duty to admit them both; *Rex* v. *Hexham*, 5 Ad. & El. 559. The duty of the lord in admitting is merely ministerial; *Roe* d. *Noden* v. *Griffits*, 4 Burr. at p. 1961. No injury is done if he admits the wrong person, as that person does not acquire by admittance any estate as against the person rightfully entitled to be admitted; *Right* d. *Wells* v. *Bawden*, 3 East 260. If the admittance is made in pursuance of, but not in accordance with, the surrender, the title conferred by the surrender prevails; *Westwick* v. *Wyer*, 4 Rep. 28 *a*; *Bunting* v. *Lepingwell*, 4 Rep. 29 *a*.

(*y*) See the form in Stud. Prec. 20; 1 K. & E. 443.

not a conveyance within the definition in the C. A. 1881, the covenants for title cannot be implied, but must be expressed in the deed.

It is improper to pay the purchase money before the surrender is actually made; for, if this were done, a subsequent purchaser without notice of the sale might, after the payment of the purchase money and before the surrender was made, take a surrender for a valuable consideration. In this case the subsequent purchaser would on his admittance acquire the legal estate as from the date of his surrender; and therefore, having an equal equity with the first purchaser, he would be preferred to him, and the latter's right to the property would be defeated.

It is understood that, to save trouble, the steward of the manor will generally appoint the purchaser's solicitor his deputy for the purpose of taking the surrender, on his accounting to the steward for the fees. The actual surrender and admittance are usually prepared by the steward.

Easement (z).

Where the object of the conveyance is to create an easement, it is, of course, proper to declare clearly what the easement is, and what are the dominant and servient tenements. For example, in the grant of a right of way (a), the owner of the intended servient tenement, in consideration, &c., "as beneficial owner," grants "unto the said [*owner of the intended dominant tenement*] his heirs and assigns, full right and liberty from time to time, and at all times hereafter, at his and their respective will and pleasure, by day and night and for all purposes to go, pass, and repass [*here state how, as 'on foot or on horseback'*] on and over a certain road or way [*describing it*] intersecting certain closes called ——."

Although it is convenient to insert recitals showing which are to be the servient and dominant tenements, they may be omitted, adding, after the first mention of the owner of the dominant tenement, his heirs and assigns, the words "owner

(z) As to the law of easements, see M. L. R. P. 343, *et seq.*

(a) See the form 1 K. & E. 583.

or owners of [*the dominant tenement*]"; and after the first mention of the owner of the servient tenement, his heirs and assigns, the words "owner or owners of [*the servient tenement*]."

Repair of way.

It should be clearly stated who, if any one, is to keep the way in repair. In the absence of express stipulation the owner of the servient tenement is under no obligation to repair the road, but the owner of the easement has a right to repair it: *Gerrard* v. *Cooke*, 2 B. & P. N. R. 109; *Newcomen* v. *Coulson*, 5 Ch. D. 143; *Stockport Highway Board* v. *Grant*, 51 L. J. Q. B. 359. It must, however, be remembered that the burden of a covenant to repair does not run with the land.

Easement created by way of use.

Before 1882 an easement could not be created by a declaration of use; but as to deeds since 1881, the C. A. 1881, s. 62, provides for the creation of an easement by a conveyance of freeholds to the use that a person shall enjoy the easement.

Conveyance by mortgagor and mortgagee.

Sometimes, where the property sold is in mortgage, and the mortgage is paid off by the purchaser, the state of the title renders it advisable to keep the mortgage on foot for the benefit of the purchaser so as to protect his estate against subsequent incumbrances. There are several methods of doing this. According to the scheme given in 2 Dav., part I., p. 324, the mortgage debt is assigned to a trustee for the purchaser, and the property is conveyed to the same trustee for better securing the mortgage money and subject thereto on trust for the purchaser. The objection to this plan is that it vests the legal estate in the trustee. According to the scheme given in 1 K. & E. 457, the mortgage debt is assigned to a trustee on trust for the purchaser and to dispose of the same as the purchaser shall direct, and in the meantime to attend the inheritance and to protect it against incumbrances, and the property is conveyed to the purchaser subject to the mortgage debt. According to another scheme the conveyance is made to the purchaser discharged from the mortgage, with a proviso that the mortgage debt shall be considered as a subsisting charge on the premises for the benefit of the purchaser and as a

protection against all mesne charges (*b*). (See the form of Release of Equity of Redemption to the mortgagee, 1 K. & E. 496.)

Equity of redemption.

The purchaser of an equity of redemption; *i.e.*, of property subject to a legal mortgage (*c*), is in a very dangerous position for the following reasons:—

First. There may be a second mortgage, the existence of which is unknown to him. In this case, as he does not acquire the legal estate, such mortgagee has priority over him by virtue of the doctrine that where the equities are equal, preference is given to priority of date; but the purchaser will obtain priority if he subsequently acquires the legal estate (*cc*).

Second. It is possible (*post*, p. 215 ) that the vendor may have other land which is in mortgage at the time of the sale. If this be the case, and the two mortgages, either are at the time of the sale, or subsequently become, vested in the same person, the purchaser will not be allowed to redeem the purchased property unless he pays off *both mortgages* (*d*). This right of consolidation is abolished by the C. A. 1881, s. 17, in cases where the mortgages are or one of them is made after 1881; but only in cases where a contrary intention is not expressed in one of the mortgage deeds. It appears, then, that, in the absence of certainty that the vendor has no other estate in mortgage at the time of sale, or, if he has, that the mortgage on the other estate was dated after 1881, and did not contain a provision giving the right of consolidation, it is desirable to procure the concurrence of the mortgagee of the purchased estate in the deed conveying the equity of redemption, for the purpose of waiving as against the purchaser his right of consolidation (1 K. & E. 494).

(*b*) The presumption, in the absence of any expression of intention, is that the mortgage is kept alive if it is to the advantage of the person who pays it off that it should subsist; see *Adams* v. *Angell*, 5 Ch. D. 634; *Re Pride* (1891), 2 Ch. 135; *Thorne* v. *Cann* (1895), A. C. 11; M. L. R. P. 218, note (*l*).

(*c*) See M. L. R. P. 201, 218.

(*cc*) See M. L. R. P. 216, *et seq.*

(*d*) See M. L. R. P. 221 *et seq.*

If the mortgagee of the purchased estate concurs, the deed will contain a release by him of the mortgagor's covenants for payment and a substituted covenant by the purchaser (*e*), or a mere release by the mortgagee of his right to consolidation. If the mortgagee is not a party, it will contain covenants by the purchaser to indemnify the vendor against the debt (see form in Stud. Prec. xxiii. p. 51; 1 K. & E. 429), an obligation which, independently of contract, is implied by Equity on the purchase being completed (*f*).

When land is sold by the owner of the equity of redemption, the land may be discharged from the mortgage under the C. A. 1881, s. 5, by which, where land subject to any incumbrance, whether immediately payable or not, is sold, the Court may, on payment into Court of an amount sufficient in the opinion of the Court to provide for principal and interest with a margin for contingencies, on the application of either vendor or purchaser (either after or without notice to any incumbrancer), declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting proper, for giving effect to the sale. On a sale of settled land an incumbrance may, with the consent of the incumbrancer, be shifted to another part of the settled land under the provisions of the S. L. A. 1882, ss. 5, 24. See 2 K. & E. 255.

Conveyance by mortgagee under a power of sale.

Where the sale is made by a mortgagee under an express or statutory power, the recitals (*g*) will comprise the mortgage

(*e*) *Re Errington* (1894), 1 Q. B. 11.

(*f*) *Waring* v. *Ward*, 7 Ves. at p. 337. If, after the conveyance of the equity of redemption to a purchaser, the mortgagee sues the original mortgagor on his covenant, the mortgagee must on payment convey the legal estate to the original mortgagor; *Palmer* v. *Hendrie*, 27 Beav. 349; 28 Beav. 341. But, as the mortgagor only requires the legal estate for the purpose of securing the payment to him, by the purchaser of the equity of redemption, of the money that he has been compelled to pay to the mortgagee, the conveyance will not be absolute in form, but will be "subject to the equity of redemption vested in any person other than the mortgagor"; *Pearce* v. *Morris*, L. R. 5 Ch. 227.

(*g*) Stud. Prec. 9.

deed (setting out the conveyance subject to redemption), and, also, if the sale is made under an express power, the authority to sell, the clause protecting purchasers from irregularities in the sale, and the receipt clause. If the power of sale is properly drawn, it will be unnecessary to recite in detail the provision as to the events on which the power becomes exercisable or the state of the mortgage debt. The contract for sale will be recited. The operative part will contain a conveyance by the mortgagee "as mortgagee," *habendum* free from all equity of redemption or claims or demands under the mortgage.

Sale by personal representatives of mortgagee.

Where a sale is made by the personal representatives of a mortgagee, the frame of the deed of conveyance depends upon the time of his death. If he died before 1882, the legal estate passed on his death to his heir or devisee. In this case the recital of the power of sale will contain the clause directing the heirs to concur; and after the recital of the mortgage will follow a recital of the will, if any, of the mortgagee, stating the appointment of executors and the devise of trust estates (if any), the death, probate, and if there be no devise of trust estates, the heirship; if no will, the death, heirship, and grant of administration. In the operative part the heir or devisee, "as mortgagee," grants at the request of the personal representatives, who, "as personal representatives of the mortgagee," grant and confirm; see the C. A. 1881, s. 7 (1) (F), *ante*, p. 109.

If the mortgagee died after 1881, the legal estate devolves on his personal representatives (C. A. 1881, s. 30), and the conveyance is made by them only (*h*).

Copyholds.

Where the sale is of copyholds and the vendor is a mortgagee, it is, generally speaking, necessary for the vendor to be admitted, so as to be able to transfer the legal estate to the purchaser by means of a surrender. In the conveyance he generally covenants only to surrender to the use of the purchaser, instead of following the stricter

(*h*) As to what becomes of the legal estate when there is no personal representative, see W. B. & C. 88.

form of covenanting to be admitted and to surrender. If there are no subsequent surrenders on the rolls, the fines due on the surrender of the mortgagee can be saved by vacating the original surrender and taking a new surrender from the mortgagor; but this course can rarely be adopted, as it is most unlikely that a mortgagee will sell under his power at a time when the equity of redemption is unincumbered, and when therefore there are no subsequent surrenders.

Conveyance by tenant for life.

By virtue of the S. L. A. 1882, a tenant for life (as defined by s. 2) and any other limited owner (as defined by s. 58) can sell (s. 3) with the usual subsidiary powers (s. 4), and convey (ss. 20 and 55), and enter into preliminary contracts (s. 31), for the sale of "the settled land," see s. 2. The "principal mansion house and the pleasure grounds and park and lands if any usually occupied therewith" are not to be sold without the consent of the trustees of the settlement or an order of Court; but "where a house is usually occupied as a farm house or where the site of any house and the pleasure grounds and park and lands, if any, usually occupied therewith do not together exceed 25 acres," this provision does not apply (S. L. A. 1890, s. 10, replacing S. L. A. 1882, s. 15, as to "the principal mansion house and demesnes thereof and other lands usually occupied therewith"). The purchase money is to be paid, at the option of the tenant for life, to the trustees of the settlement or into Court (s. 22). The persons who are for the time being, under a settlement, trustees with power of sale, or of consent to or approval of the exercise of such a power, or if there are no such persons, then the persons for the time being declared by the settlement to be the trustees thereof for the purposes of the Act, are for the purposes of the Act "trustees of the settlement" (s. 2 (8)). If there are no such persons, it is provided by the S. L. A. 1890, s. 16, that the following persons shall be trustees of the settlement for the purposes of the S. L. Acts, viz.: "(1) The persons (if any) who are for the time being under the settlement trustees with power of or upon trust for sale of

any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale; or, if there be no such persons, then (2) The persons (if any) who are for the time being under the settlement trustees with future power of sale or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale and whether the power or trust takes effect in all events or not."

A tenant for life, when intending to make a sale, is bound to give one calendar month's notice (which may be notice of a general intention to sell; S. L. A. 1884, s. 5) by registered letter (S. L. A. 1882, s. 45) to each of the trustees, and also to their solicitor if any is known to him; and at the date of the notice there must be at least two trustees, unless a contrary intention is expressed in the settlement. See more as to the statutory powers of the tenant for life, *post*, Chap. XI.

The conveyance by the tenant for life is effectual (s. 20 (1)) to pass the land sold, "including copyhold or customary or leasehold land vested in trustees," "for the estate or interest the subject of the settlement or for any less estate or interest." This is a statutory power, which enables the tenant for life to convey the land itself, not merely to declare the use: and, in cases where the legal estate in freeholds or leaseholds passed by the settlement, and has not since been conveyed away to secure money actually raised, to convey it, even if it be vested in trustees. The conveyance by the tenant for life passes the right to admittance in the case of copyholds; s. 20 (3). It will be observed that the trustees are not necessary parties to a conveyance by the tenant for life (except for the purpose of testifying their consent to the sale of a mansion house, &c., where no order of Court has been obtained), as the purchase money may be paid into Court; and, even if it be paid to the trustees, it is sufficient for them to give a receipt for it, which need not be contained in the conveyance.

It is, however, the usual practice to make the trustees parties where the money is to be paid to them; in which case the conveyance will take the following form (*i*). The settlement and any subsequent events should be recited so as to show that A. is tenant for life (or a person having the powers of a tenant for life), and that B. and C. are "trustees of the settlement" within the Act. In cases where brevity is desired, the recital may run as follows:—"Whereas by an indenture dated, &c., the hereditaments hereby assured were limited to certain uses under which the said A. is now tenant for life in possession thereof, and the said indenture contains a power of sale of the said hereditaments now exercisable by the said B. and C. with the consent of the said A.;" or "and the said B. and C. were thereby appointed trustees thereof for the purposes of the S. L. Acts, 1882 to 1890." The recital of the contract for sale will be that A., "in exercise of the powers vested in him by the S. L. Acts, 1882 to 1890," (and, if the principal mansion house, &c., is sold "with the consent of the said B. and C.,") has agreed, &c.; or, if necessary, recite an order of Court giving general power to sell the mansion house and subsequent agreement for sale, or a conditional agreement for sale and order of Court approving of the agreement. It is not necessary to recite that the notices under s. 45 were given. The consideration will be expressed to be paid by the purchaser "by the direction of the said A. to the said B. and C. as such trustees as aforesaid;" the receipt will be given by B. and C. A., "as beneficial owner, and in exercise of the powers vested in him by the S. L. Acts, 1882 to 1890, and of every other power, &c.," grants (or as the case may be), adding, in the case of a conveyance of the mansion house, &c., "with the consent hereby testified of the said B. and C.," or "with the approval of the Chancery Division (*j*), as appears by the hereinbefore recited order of the —— day

(*i*) Stud. Prec. 18; 1 K. & E. 479.

(*j*) See S. L. A. 1882, s. 46 (1), and as to the jurisdiction of County Courts, *ib.* (10).

of ——." The habendum will be "unto and to the use of [*the purchaser*] in fee simple;" and it is the practice to add "discharged from all the limitations, powers, and provisions of the said indenture of settlement, and from all estates, interests, and charges subsisting or to arise thereunder;" but this is not necessary. If the covenants implied by A. conveying "as beneficial owner" extend to the acts of a prior owner, a proviso should be added restricting them as respects the reversion expectant on A.'s life estate to the acts of A. and persons claiming under him (*ante*, p. 110).

Conveyance by trustees under a power.

The S. L. A. does not take away or abridge any power subsisting under a settlement exercisable by a tenant for life, or by trustees with his consent, &c., or otherwise; but, in case of conflict between the provisions of the settlement and the Act "relative to any matter in respect whereof the tenant for life exercises, or contracts or intends to exercise any power under the Act," the provisions of the Act prevail: and "the consent of the tenant for life" is "necessary to the exercise by the trustees of the settlement or other person of any *power* conferred by the settlement exercisable for any purpose provided for in the Act" (s. 56), even if the settlement expressly makes the powers of the trustees exercisable without the consent of any other person. This provision as to *powers* of sale must be distinguished from cases of *trusts* for sale; *post*, p. 134.

The result is that no power of the settlement is destroyed, but no such power "which is exercisable for any purpose provided for in the Act" can be exercised without the consent of the tenant for life, or, if two or more persons constitute the tenant for life without the consent of one of such persons (*k*). For instance, a power to trustees to raise money by mortgage, which is not a purpose provided for in the Act, remains exercisable by them without the consent of the tenant for life; but a general power of sale given by the settlement to trustees would be a purpose provided for by the Act, and therefore could not be exercised without the consent of the

(*k*) S. L. A. 1884, s. 6 (2).

tenant for life. It appears probable that a power to sell for a specific purpose not provided for in the Act, as to raise charges, remains exercisable by the trustees without the consent of the tenant for life (*l*).

Where a conveyance is made by trustees under an express power of sale, the recitals should state the authority to sell and convey; or, if the trustees take no legal estate, the authority to revoke the uses and declare fresh uses; and should also show that a state of things has happened which authorises them to sell (*m*). If the trustees have the legal estate, the conveyance takes effect out of their estate, and they grant "as such trustees as aforesaid in exercise of the said recited power and of every other power in this behalf them enabling;" and, if a tenant for life has to concur, either on account of the terms of the power, or owing to the provisions of the S. L. A., "with the consent of the said A., and (for the purpose only of implying covenants by the said A. for title and further assurance) by the direction also of the said A. directing as beneficial owner." (See *ante*, p. 106.) If the trustees have no estate, and convey freeholds by virtue of a power, it will be remembered that, whether the power is stated to operate by way of revocation of use and new appointment or not, it operates as a declaration of use, and the legal estate becomes vested in the purchaser by virtue of the Statute of Uses, the new uses being fed by the seisin of the grantee or devisee to uses. In this case, "in exercise of the recited power, &c.," the trustees "revoke all the uses, trusts, and limitations of the —— and hereditaments hereinafter appointed, which are now subsisting and capable of taking effect under the said settlement, and do hereby appoint that the same shall remain and be to" the new uses.

Conveyance under a trust for sale.

The S. L. A. 1882, s. 63, extended the provisions of the Act to settlements made by way of trust or direction for the sale of land, "and for the application or disposal of the money to arise from the sale, or the income of that money,

(*l*) See W. B. & C. 387. (*m*) Stud. Prec. p. 11.

for the benefit of any person for his life, &c." The person beneficially entitled to the income of the land until sale is to be deemed to be tenant for life thereof, and the trustees for sale are for purposes of the Act trustees of the settlement.

This provision caused much inconvenience in cases where the sale moneys were to be divided and each share was settled, as it rendered the concurrence of the tenant for life of each share necessary (*n*). To obviate this difficulty it was provided by the S. L. A. 1884 (s. 6) that, in the case of a settlement within the meaning of s. 63 of S. L. A. 1882, any consent not required by the terms of the settlement is not, by force of anything contained in the Act of 1882, to be deemed necessary to enable the trustees of the settlement to execute the trusts or powers of the settlement. By the same Act (s. 7) the powers conferred on tenants for life by s. 63 of the Act of 1882 (*i.e.*, when the settlement is by way of *trust* for sale) are not to be exercised without the leave of the Court; the order giving leave may be registered and re-registered as a *lis pendens* against the trustees; and while it is in force, no person other than the person having the leave can execute any trust or power created by the settlement for any purpose for which leave is by the order given to exercise a power conferred by the Act of 1882.

It follows that, where a conveyance is to be made under a *trust* for sale, and no order has been made by the Court under the Act of 1884, the transaction is not affected by the S. L. Acts. The recitals will state the instrument creating the trust, so far as to show the creation of the trust, and with what consents, if any, it is to be exercised. If necessary, any changes in the trustees and consequent conveyances of the legal estate will be stated. In the operative part the trustees will convey "as trustees and in pursuance of the trust for sale in the recited indenture (or will) contained." If the consent of the tenant for life is required by the terms

(*n*) See *Re Harding's Estate* (1891), 1 Ch. 60.

of the trust, add "with the consent and by the direction of the said A. directing as beneficial owner" (*o*).

On the other hand, where an order has been made by the Court giving leave to the tenant for life to exercise the statutory powers, the recitals will state the instrument creating the trust for sale and the order. The tenant for life will convey "as beneficial owner" and "by virtue of the power conferred on him by the recited indenture (or will) and order of Court." The rest of the conveyance will follow the ordinary form of a conveyance by a tenant for life under the powers of the S. L. Acts, 1882 to 1890.

Equitable interests.

Equitable interests in land are conveyed in practice in the same manner as if they were legal estates; but it should be remembered that any writing signed by a vendor expressing his agreement to sell the property, together with the payment of the purchase money, is sufficient to transfer his equitable interest to the purchaser (*p*). Suppose, for instance, that, by a deed containing a recital of an agreement for the sale of two properties for a certain sum and a receipt for that sum, one property only is conveyed to the purchaser, and the other is omitted, an equitable interest in the latter passes.

Married woman.

The form of a conveyance of freeholds belonging to a married woman depends upon whether the case falls within the provisions of the M. W. P. A. 1882, or not.

In cases falling within the Act, *i.e.*, where the woman was married after 1882, or where, though she was married before 1883, her title first accrued (*q*) after 1882, the conveyance will be in the same form as if she were a *feme sole;*

(*o*) As to the covenants for title to be given by the tenant for life, see *ante*, p. 110.

(*p*) See *McCreight* v. *Foster*, L. R. 5 Ch. 604; *Shaw* v. *Foster*, L. R. 5 H. L. 321. It must be remembered, however, that an equitable limitation by way of trust executed has the same construction as a legal limitation, and that therefore in this case a fee simple will not pass without the word "heirs" or "fee simple." Interp. 276; *Re Whiston* (1894), 1 Ch. 661.

(*q*) *Reid* v. *Reid*, 31 Ch. D. 402; *Re Dixon*, 35 Ch. D. 4; *Re Parsons*, 45 Ch. D. 51.

but it is proper to show by recital the date of her marriage, and if it was before 1883, the time when her title accrued, so as to show that the Act applies. Occasionally the husband concurs "as beneficial owner" in the conveyance, so as to covenant for title (*ante*, p. 108), but this is unusual.

In cases not falling within the Act, *i.e.*, where the woman was married and her title accrued before 1883, her freeholds are conveyed by her (by virtue of the Fines and Recoveries Act, 1833, 3 & 4 Will. 4, c. 74, ss. 77 *et seq.*) by deed in which her husband concurs, and which is acknowledged by her pursuant to the Act, as modified by the C. A. 1882, s. 7. The form of the conveyance is the same as if she were a *feme sole*, with the following exceptions, viz., the contract with the purchaser is stated to have been made by the husband and wife, the purchase money is paid to the husband and wife, who join in the receipt for it, and the wife, "as beneficial owner with the concurrence of the said [*husband*], grants, and the said [*husband*] as beneficial owner grants and confirms" (see *ante*, p. 108, as to what covenants for title are implied).

As the purchase money ought not to be paid till the deed has been acknowledged, it appears improper to state in the deed that it is intended to be acknowledged or to make the husband covenant that the wife shall acknowledge it. The draftsman ought to call attention to the necessity for acknowledgment in the margin of the draft.

Married woman's separate property.

Formerly there was a serious difference of opinion between the Courts as to the proper method of conveying freeholds forming the separate estate, either under an express trust or by virtue of the M. W. P. A. 1870 (see *post*, p. 138), of a woman who was married before 1883 (*r*).

It is now settled that she can dispose of her equitable interest as if she were a *feme sole*, *i.e.*, by deed *without*

(*r*) See *Adams* v. *Gamble*, 12 Ir. Ch. Rep. 102; *Lechmere* v. *Brotheridge*, 32 Beav. 353; *Taylor* v. *Meads*, 4 De G. J. & S. 597; *Hall* v. *Waterhouse*, 5 Giff. 64. See as to conveyances by married women, M. L. R. P. 122 *et seq.*; 1 K. & E. 499, 501.

acknowledgment; and the legal estate, if outstanding in trustees, must be conveyed by them in the usual manner; but, if there are no trustees, and the husband is at law seised in fee in right of his wife, then, in order to pass the legal estate, he must concur, and the deed must be acknowledged by her. See M. L. R. P. 126; 1 K. & E. 501.

Restraint on anticipation.

A married woman is unable to dispose, by act *inter vivos*, of property which is her separate estate (either under an express trust or by virtue of the M. W. P. A. 1870, or the M. W. P. A. 1882, see s. 19), where it is subject to a restraint on anticipation; but the Court may, where it appears to be for her benefit, with her consent bind her interest in any property notwithstanding the restraint; C. A. 1881, s. 39.

Wife's copyholds.

A wife's copyholds, in cases not falling within the M. W. P. A. 1882, are generally conveyed by surrender by herself and her husband, she being first separately examined by the steward as to her consent; but the custom as to the mode of conveyance varies in different manors. In cases falling within the Act, she can surrender without her husband's concurrence.

Wife's leaseholds.

In cases not falling within the M. W. P. A. 1882, a husband can convey his wife's leaseholds in possession without her concurrence; and he can without her concurrence convey her reversionary leasehold property if it be such as may possibly fall into possession during the coverture: but she should be a party to and acknowledge a deed purporting to pass any equitable interest which she may have in leaseholds. (Dart, V. & P. 9. See 1 K. & E. 537.)

Wife's interests under the Married Women's Property Act, 1870.

The M. W. P. A. 1870 (33 & 34 Vict. c. 93; see M. L. P. P. 392) (*s*), provided (s. 7) that a woman married after the passing of the Act (*i.e.*, 9th August, 1870) should hold as her separate property "any personal property devolving on her as next of kin, or one of the next of kin, of an intestate, or any sum of money not exceeding £200 (*t*) to which she should

(*s*) This Act was repealed by the M. W. P. A. 1882.

(*t*) This limit does not apply to property taken under an intestacy. *Re Voss*, 13 Ch. D. 504.

become entitled under any deed or will; and (s. 8) that where any freehold, copyhold, or customaryhold property should descend on her as heiress or co-heiress of an intestate, the rents and profits of such property should belong to her for her separate use (*u*). The conveyance of property to which a woman became entitled under the Act is made exactly in the same manner as if the property had been assured to her for her separate use without the intervention of a trustee; that is to say, the wife, with the concurrence of the husband, conveys, in the case of freehold by deed acknowledged, in the case of copyhold by surrender on her separate examination: in the case of leaseholds the husband alone conveys; but the wife must concur in each case for the purpose of conveying her equitable interest and joining in the receipt for the purchase money.

Bankrupt.

The property (see the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 44), both real and personal, belonging to a bankrupt at the commencement of the bankruptcy, or acquired by or devolving on him before his discharge, including the capacity to exercise all powers (except the right of nomination to a vacant ecclesiastical benefice) that the bankrupt could exercise for his own benefit, vests in the trustee under the bankruptcy (see s. 54) (*x*). The certificate of the Board of Trade is the proper evidence of the appointment of the trustee. The trustee can convey the bankrupt's freeholds exactly in the same manner as if he were an ordinary trustee. Some practitioners procure the bankrupt's concurrence, if possible, but this appears to be useless, as his covenants for title must be worthless, and the annulment of the bankruptcy would not prejudice a sale previously made by the trustee (see s. 35).

The recitals in a conveyance by the trustee in bankruptcy should state the adjudication of bankruptcy, the appointment of the trustee, and also that the property comprised in the

(*u*) This separate use affects only the income, and not the fee; *Johnson* v. *Johnson*, 35 Ch. D. 345.

(*x*) See M. L. P. P. 315, 322.

conveyance belonged to the bankrupt at the date of the adjudication, or (as the case may be) devolved on him after it and before his discharge. The trustee "as trustee" grants, and the bankrupt, if a party, "as beneficial owner" releases (see form, 1 K. & E. 497).

A conveyance of the bankrupt's leaseholds by the trustee is in the usual form, except that neither the bankrupt nor the trustee is entitled to any covenant from the purchaser to indemnify him against the covenants in the lease, as the bankrupt will on his discharge become free from all liability (see the Bankruptcy Act, 1883, s. 30; but see also *ante*, p. 122, note), and the trustee is freed from all subsequent liability (see 2 Dav. Prec. 624, note). As to the liability of the trustee for rent up to the sale, see *The Swansea Bank, Limited*, v. *Thomas*, 4 Ex. D. 94.

The copyholds of a bankrupt can be dealt with by the trustee in bankruptcy in the same manner as if they had been surrendered to such uses as the trustee should appoint (see s. 50 (4)). The trustee, therefore, need not be admitted.

Purchasers, whether joint tenants or tenants in common.

Where a conveyance is made to two purchasers as joint tenants, then if they advanced the purchase money in equal shares, they are presumed to have intended to take their chance of survivorship, and accordingly they are joint tenants in Equity as well as at Law (*Robinson* v. *Preston*, 4 K. & J. 505); but, if the purchase money was advanced in unequal shares, or if the property was purchased for trading purposes, or out of moneys belonging to them as partners, they are considered as tenants in common in Equity. See the notes to *Lake* v. *Craddock*, 2 W. & T. L. C.

Purchase by partners.

A conveyance made to partners for the purposes of their business should contain a recital that they are partners, and of their wish that the property should be conveyed to them "in manner hereinafter appearing." The limitation will be to "the use of the said [*partners*] their heirs and assigns, as joint tenants, in trust for the said [*partners*] their heirs and assigns, as tenants in common as part of their partner-

ship estate" (*y*). Sometimes an express power is added, enabling the surviving partner to sell, mortgage, or lease without the concurrence of the representative of the partner first dying. (1 K. & E. 406.) And it seems useful to add a power to the partners for the time being to appoint a new trustee in the place of any trustee who is not at the time of appointment a member of the firm in the same manner as if he were dead. (1 K. & E. 406.) The object of this provision (which will not be understood by the student until he has studied the chapter on Appointment of New Trustees, *post*, Chap. XIII.) is to enable the legal estate to be got in from a person who has ceased to be a trustee, or from his representatives, without his or their concurrence, by means of a vesting declaration under the Trustee Act, 1893, s. 12.

(*y*) See various forms of limitations discussed, 33 Sol. J. 102.

## CHAPTER VI.

### MORTGAGE DEEDS OF INTERESTS IN LAND.

What a mortgage is (*a*).

THERE is considerable difficulty in framing any definition of a mortgage which would be intelligible to beginners; for under the common name of mortgage we include instruments which operate in very different manners. But the typical form of mortgage, that of a mortgage in fee, may be described as a conveyance of land to a creditor subject to a proviso (see form in Stud. Prec. 54) for reconveyance on payment of the debt and interest on a day named in the proviso. The effect of such a mortgage at *law*, is that, if the money is not paid on the day so appointed, the creditor (who is called the mortgagee) becomes absolute owner of the land. But, in Equity, the time named for payment is not considered as of the essence of the contract, and the estate may be "redeemed" and a reconveyance compelled afterwards; for the debtor (who is called the mortgagor) is considered to remain the owner, and the rights of the mortgagee over the land are merely those necessary for enforcing payment of the debt (*b*). In old times a mortgage was defined (see Co. Lit. 205 *a*) as a feoffment in fee, upon condition to be void if the feoffor or his heirs should on a fixed day pay the debt and interest to the feoffee or his representatives. At law, the effect of performing the condition, by payment on the day, was to defeat the feoffment and to restore the mortgagor to his original estate, while non-payment on the day gave to the

(*a*) M. L. R. P. 196.

(*b*) This equitable right of the mortgagor to redeem after the day appointed for payment is called his "equity of redemption" (M. L. R. P. 201).

mortgagee an estate in fee discharged from the condition. As, however, at the present time mortgages are rarely if ever made by a conveyance upon condition, but are always made by a conveyance subject to a proviso for reconveyance called the proviso for redemption, we will confine our attention entirely to mortgages made in the latter manner.

The doctrines of Equity have given a very different meaning to a mortgage from that which it bore in Littleton's time, when (as has been stated) the mortgagee would acquire the estate absolutely on non-payment of the money on the appointed day. Now, on the contrary, Equity lays down the rule that a mortgage cannot by any bargain entered into between the parties at the time of making the mortgage be made irredeemable—a doctrine sometimes stated as follows: "Once a mortgage always a mortgage."

Sale with option to purchase.

On the other hand, a vendor can convey land to a purchaser subject to a power of repurchase by the vendor at a given time for a fixed sum. The distinction between a conveyance of this nature and a mortgage is very clear in principle. In the one case the contract is really for a sale, subject to a *locus pœnitentiæ* on the part of the vendor. In the case of a mortgage, the parties do not contemplate that the land shall change hands, and it does not become the absolute property of the mortgagee even on non-payment of the money on the appointed day: but only by the operation of legal proceedings taken by the creditor (the mortgagee) for the purpose of procuring repayment of his money.

A mortgage is an example of vulgar errors about law.

A common mortgage affords a good example of the erroneous notions as to law entertained by most people. Sometimes the plot of a novel turns on the supposed impossibility of redeeming an estate in mortgage after the appointed day for payment has passed; or, again, the villain of the story determines to ruin a mortgagor by buying up all the mortgages on his property, and then selling it under the mortgagee's power of sale. Although the forced sale may probably cause the land to be sold

cheap, the result will probably be to increase the income of the mortgagor. As an example: suppose the rent-roll of an estate to be £3,000 a year, representing a selling value of £90,000, the interest of mortgages on it (amounting to £60,000 at £4 per cent.) is £2,400, leaving a net income (subject to the expenses of managing the estate) of £600. After the sale the mortgagor has £30,000, which, invested at £4 per cent., gives an income of £1,200, or reinvested in land at thirty years' purchase, gives £1,000 as the annual income. The author has been informed of a case where the mortgages absorbed the whole rental of the property, and yet, on the property being sold, there remained, after paying off the mortgages, over £200,000 for the mortgagor.

Mortgage effected by indenture.

A mortgage of an estate in fee simple may be regarded as the typical form of mortgage. It is effected by an indenture, the narrative recitals in which are framed so as to show the nature of the interest intended to be mortgaged, and are similar to those which would be inserted in a purchase deed; the introductory recitals state the agreement for the loan and security. Sometimes, when brevity is of importance, the deed is framed without any recitals at all; but this is rare.

Arrangement of clauses.

The clauses forming the operative parts of a mortgage deed (see form in Stud. Prec. 52) are usually arranged in the following groups:—

I. The covenant to pay the principal with interest on an appointed day.

II. The covenant for payment of interest if the principal be not paid on the appointed day.

III. The mortgage proper. This consists of the conveyance and the proviso for redemption, *post*, p. 148.

IV. Clauses altering the primary contract as regards the time and manner of payment of principal and interest, *post*, pp. 151 *et seq.*

V. The provisions for keeping up the value of the mortgaged property, *post*, pp. 157 *et seq.*

VI. The clauses giving additional remedies to the mortgagee, *post*, pp. 162, *et seq.*

VII. The mortgagee's indemnity clause, *post*, p. 173.

VIII. The covenants for title, which are now invariably implied by the mortgagor conveying "as beneficial owner," *post*, p. 174.

It appears to the author that the arrangement here suggested should, as a general rule, be adhered to; otherwise, there is a risk that a person perusing the mortgage in haste may not observe a clause in an unusual place. Sometimes, however, other arrangements are adopted, as, for instance, Groups II. and III. are transposed by Mr. Davidson, or Group III. may precede all the other clauses.

Group I. Covenant for repayment of loan.

*Group I.* consists of a single clause, a covenant by the mortgagor with the mortgagee for the repayment of the loan on a certain day (generally six months from the date of the mortgage), with interest in the meantime at a specified rate. (See forms 2 K. & E. 9.) Where this covenant forms the first witnessing clause, we follow the usual practice of stating the consideration in it, referring back to it as "the consideration aforesaid" in the clauses by which the conveyance is made.

Formerly, this covenant was sometimes omitted, and in its place a bond of even date with the mortgage deed was given for the payment of the mortgage debt and interest.

If no covenant or bond for payment of the debt be given, the mortgagee becomes a simple contract creditor of the mortgagor (*c*); though, even where there is no formal covenant or bond, it may be held on the construction of the whole deed that a specialty debt is created by implication. In some few cases, however, the mortgagor is, by a proviso in the deed, freed from personal liability, the land forming the sole security; as, for instance, if trustees in exercise of a power raise money on mortgage, and there is no *cestui que trust* able and willing to enter into the usual covenants. In the case of a mortgage by trustees under a power, an adult tenant for life sometimes enters into the covenant, and a

(*c*) M. L. R. P. 196.

proviso is inserted declaring that, as between the tenant for life and the remainderman, the land shall primarily be charged with the debt, so as to render the tenant for life a surety only.

Specialty debt.

Formerly, there was considerable advantage in securing the debt by a bond or covenant, because a specialty creditor had priority over simple contract creditors in the administration of the debtor's estate; but, the effect of the Administration of Estates Act, 1869 (32 & 33 Vict. c. 46), commonly known as Hinde Palmer's Act, is to place the creditors, whether by simple contract or specialty, of persons dying on or after 1st January, 1870, on the same footing in administration (*d*) (except that under the Debts Recovery Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 47, ss. 6 and 8 (*e*) ) a creditor under a specialty by which the heirs are bound can sue the heir or devisee and obtain judgment to the extent of the assets which have devolved on him); so that now the principal difference between the two classes of debts consists in the difference of time allowed by the Statutes of Limitation for the recovery of them (*f*).

Form of covenant.

Formerly it was the practice to make a covenantor covenant "for himself, his heirs, executors, and administrators," or, in cases where the covenant related to land, and was intended to be performed by each successive owner, "for himself, his heirs, executors, administrators, and assigns." The word "heirs" was omitted in those rare cases where the heirs were not intended to be bound; and the words "executors and administrators," though invariably inserted, were superfluous, as executors and administrators were bound without being mentioned. The C. A. 1881, s. 59, makes a covenant made after 1881, though not expressed to bind the heirs, operate to bind the heirs and real estate of the covenantor (as well as his executors and administrators and personal estate), as if heirs were expressed.

(*d*) See *Re Hankey*, (1899) 1 Ch. 541.

(*e*) See M. L. R. P. 116; M. L. P. P. 154; *Re Hedgely*, 34 Ch. D. 379.

(*f*) See M. L. P. P. chap. xix.

It is now therefore the practice to omit the words "heirs, executors, or administrators," of the covenantor, so that the commencement of the covenant is, "A. hereby covenants with B." There is no necessity to mention the "executors, administrators, or assigns" of the mortgagee, or the "heirs, executors, or administrators" of the mortgagor in the covenants for payment.

Group II. Covenant for payment of interest.

*Group II.* consists only of a covenant for payment of interest on so much of the principal as shall for the time being remain unpaid after the appointed day. In the absence of such a covenant, the mortgagee can recover interest as damages for non-payment of the principal on the appointed day (*g*).

It should be noticed that occasionally a person is willing to covenant for the payment of the interest for a certain time only. Thus, when a mortgage is made by trustees under a power, it sometimes happens that the tenant for life objects to covenant to pay the principal, but is willing to covenant to pay the interest accruing during his life (see 2 K. & E. 10). The covenant to pay interest is inserted for the benefit of the mortgagee; but the tenant for life is, in the absence of any covenant, bound, as between himself and the remainderman, to keep down the interest during his life, unless the rents are insufficient for that purpose, and he gives notice of their insufficiency to the remainderman (*h*). Sometimes, where a reversioner mortgages his interest, the tenant for life covenants as surety to pay interest during his own life, and charges his life interest with such payment (2 K. & E., note 113). In this case a provision should be inserted in the deed declaring that the reversioner and his estate shall be primarily liable to pay the principal money and interest, so as to render the tenant for life a surety only (2 K. & E. 114).

(*g*) *Re Roberts*, 14 Ch. D. 49.

(*h*) *Lord Kensington* v. *Bouverie*, 7 H. L. C. 557; *Caulfield* v. *Maguire*, 2 Jo. & Lat. 141, see p. 158; *Sharshaw* v. *Gibbs*, Kay, 333; *Marshall* v. *Crowther*, 2 Ch. D. 199.

Group III. Conveyance.

*Group III.* comprises—

*First*, a conveyance of the mortgaged property. This is in a form similar to that which would be adopted in the case of an absolute conveyance; but the estate of the mortgagee is made "subject to the proviso for redemption hereinafter contained." *Second*, a proviso for redemption (which, if there be more than one clause of conveyance, follows the last), and is to the effect that "if the said [*mortgagor*] his heirs, executors, administrators, or assigns, shall on the said — day of" [namely, the day on which the principal is covenanted to be paid] "pay to the said [*mortgagee*] his executors, administrators, or assigns, the said sum of £—— [*principal*] together with interest thereon in the meantime at the rate aforesaid," *i.e.*, *at the rate mentioned in the covenant;* "then the said [*mortgagee*] his executors, administrators, or assigns, shall at any time thereafter upon the request and at the cost of the said [*mortgagor*] his heirs, executors, administrators, or assigns, reconvey the said premises hereinbefore granted to the use of the said [*mortgagor*] his heirs or assigns."

Proviso for redemption.

Reconveyance by personal representatives.

It was formerly the practice to direct the reconveyance to be made by "the said [*mortgagee*] his heirs or assigns;" but after the passing of the V. & P. A. 1874 (37 & 38 Vict. c. 78), which (s. 4) enabled the legal personal representative of a mortgagee of freeholds, or of copyholds to which the mortgagee had been admitted, to reconvey or surrender the mortgaged land on payment of all sums secured by the mortgage, many practitioners directed the reconveyance to be made by "the mortgagee, his heirs, executors, administrators, or assigns, as the case may require;" for it will be observed that the Act only applied to cases where the mortgage was entirely paid off, and that accordingly the heirs, and not the executors or administrators, of the mortgagee were the proper persons to reconvey on payment of part only of the mortgage money. This section has been repealed as to deaths after 1881 by the C. A. 1881, s. 30, which provides that an estate of inheritance vested by way

of mortgage in any person solely (*i.e.*, in a sole mortgagee or the survivor of several mortgagees) shall on his death, notwithstanding any testamentary disposition, devolve to and vest in his legal personal representatives as if it were a chattel real (*i*). It follows that, in mortgages made after 1881, the reconveyance should be directed to be made by the "executors, administrators, or assigns," no mention being made of the heirs.

Mortgagee may be compelled to transfer.

Formerly, it was the strict duty of the mortgagee on being paid off to reconvey to the mortgagor; and he could not be forced to convey to any other person, however ruinous to the mortgagor might be the consequences of his refusal (*j*). Formerly the words "or as he or they shall direct" were added at the end of the proviso for the purpose of excluding this rule. They are now omitted, as the C. A. 1881, s. 15 (as modified by the C. A. 1882, s. 12), provides that the mortgagor and any subsequent incumbrancer, on paying off the mortgagee, may require him, unless he is or has been in possession, to assign the mortgage debt and convey the mortgaged property to any third person, notwithstanding any stipulation to the contrary (*k*).

The old practice of naming the hour and place for repayment has long since been discontinued; and the day mentioned in the proviso is not now considered as fixing a date after which the mortgagor cannot redeem, but as fixing a date before which the mortgagee cannot foreclose. Although the mortgagor has a legal right (*Chesworth* v. *Hunt*, 5 C. P. D. at p. 271) to pay off on the day appointed, he never does so in practice; and if he does not, he has, in the absence of special stipulation to the contrary, to give the mortgagee six months' notice of his intention to pay him off (*l*), or to

Notice to pay off.

(*i*) This enactment is repealed as to copyholds where the mortgagee who dies has been admitted; see the Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45, repealed by the Copyhold Act, 1894, and re-enacted by s. 88.

(*j*) See *Walker* v. *Jones*, L. R. 1 P. C. at 61; *Dunstan* v. *Patterson*, 2 Ph. 341.

(*k*) See *Teevan* v. *Smith*, 20 Ch. D. 728, set out in M. L. R. P. 211.

(*l*) M. L. R. P. 203, *Browne* v.

pay six months' interest in lieu of notice (*m*). The mortgagee can, at any time after the day mentioned in the proviso, require payment of his money, or take proceedings to enforce his security (Fisher on Mortgages, p. 348). It should be observed that the mortgagor has an equitable estate in the land; that he can deal with this estate just as if he had not made a mortgage; and that, when he conveys away the whole or part of his estate, he necessarily gives to each person on whom he confers an estate the right to do that which he himself could have done, *i.e.*, a right to redeem the mortgage. The result is that every person interested in the equity of redemption has a right to redeem, subject to any equities which have priority over his estate. According to this rule a person entitled by agreement to a lease of the equity of redemption has been allowed to redeem (*n*).

Who may redeem.

The right to redeem may exist even where the deed contains no express power of redemption; for it may be inferred from the nature of the transaction (*o*).

If the mortgage deed were to stop after the proviso for redemption, it would entitle the mortgagee to his most characteristic remedy for the non-payment of the mortgage debt and interest, namely, foreclosure (M. L. R. P. 203). This is obtained on application to the High Court (in the Chancery Division) (*p*), which orders the mortgagor to pay principal and interest on a given day, generally six months from the date of the certificate by the Master (formerly

Fore-closure.

*Lockhart*, 10 Sim. 420; *Smith* v. *Smith*, (1891) 3 Ch. 550. The rule does not apply to equitable mortgages by deposit; *Fitzgerald's Trustee* v. *Mellersh*, (1892) 1 Ch. 385.

(*m*) *Johnson* v. *Evans*, (1889) W. N. 95; S.C. 61 L. T. Rep. 18; *Bartlett* v. *Franklin*, 15 W. R. 1077. If, however, the mortgagee takes proceedings to enforce payment, he is entitled to interest only to the date of payment; *Re Alcock*, 23 Ch. D. 372. But the mortgagor cannot redeem on an earlier day than that appointed by the certificate in a foreclosure action on payment merely of principal and interest up to such date; *Hill* v. *Rowlands*, (1897) 2 Ch. 361.

(*n*) *Tarn* v. *Turner*, 39 Ch. D. 457.

(*o*) Fisher on Mortgages, p. 9.

(*p*) Or to the county court where the mortgage does not exceed 500*l.*: see the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 67 (3).

called "Chief Clerk") finding what amount is due; and declares that "in default of such payment he shall be debarred and foreclosed of and from all right title and equity of redemption;" in other words, that the land shall belong to the mortgagee, free from redemption. The right of foreclosure is incident not only to a mortgage properly so called, but also to an equitable mortgage, made either by a formal mortgage of the equity of redemption or by a deposit of the deeds, with or without a written memorandum (*q*).

Right to redeem reserved incorrectly.

"It sometimes happens that by the language of the proviso for redemption the right to redeem is limited to a person who had either no interest or a partial interest only in the land at the time of the mortgage; and that from the circumstances it becomes doubtful whether the person to whom the equity of redemption is thus limited does not acquire under the limitation the beneficial ownership of the equity of redemption; or, at least, a greater interest in it than he had in the land before the mortgage" (Butler's note 106 to Co. Lit. 208 *a*). For instance, if a mortgage is made of a wife's land to secure her husband's debt, and the equity of redemption is limited to the husband: the question, which is sometimes of great nicety, arises, is the title to the equity of redemption altered or not (*r*)?

If it is really intended to change the title to the equity of redemption, a recital to that effect should be inserted (see form, 2 K. & E. 87): but there is little risk of changing the title contrary to the intention, merely by reserving the equity of redemption in fee to some person, who conveys or concurs in the conveyance, not being the owner in fee.

Group IV.

*Group IV.* The propriety of the insertion of these clauses depends upon the circumstances of each case; the more important clauses of the group provide—

(*a*) For reduction of interest on punctual payment.

(*q*) M. L. R. P. 226; and see *Backhouse* v. *Charlton*, 8 Ch. D. 444; *James* v. *James*, L. R. 16 Eq. 153; *Lees* v. *Fisher*, 22 Ch. D. 283.

(*r*) *Jackson* v. *Innes*, 1 Bli. 104; *Re Betton*, L. R. 12 Eq. 553; *Meek* v. *Chamberlain*, 8 Q. B. D. 31; *Plomley* v. *Felton*, 14 App. Cas. 61

(*b*) For the continuance of the loan for a time certain.

(*c*) For repayment by instalments.

(*d*) For putting the mortgagees, if more than one, on the footing of joint tenants as regards the receipt of the mortgage money.

Clauses (*a*), (*b*), and (*c*) are sometimes framed as covenants by the mortgagor or mortgagee as the case requires. (See Dav., *passim*.) There is some advantage not only in brevity, but also in avoiding the risk of clerical error in framing them as an agreement and declaration. (See 2 K. & E. 31 *et seq.*) Where, in a clause framed as an agreement and declaration, it is stated that a person is to do a thing, he alone is bound to do it (*s*). It follows that the effect of the clauses, in whichever form expressed, is the same.

Reduction of interest on punctual payment (*t*).

(*a*) The object of the provision for reduction of interest on punctual payment is to induce prompt payment. Such a provision is extremely convenient, and its insertion should generally be stipulated for by a prudent mortgagee. It provides that, if the mortgagor pays interest at *the reduced rate*, on or within a specified time after each day appointed for payment of interest, the mortgagee shall accept such payment in satisfaction of the interest due on such day. For example, if it be intended that interest should be paid at 4 per cent., the mortgage would be drawn making it payable at 5 per cent., and then the proviso would make only 4 per cent. payable on punctual payment.

The converse agreement, that a higher rate of interest shall be paid if the interest be not paid punctually, is regarded in the light of a penalty, and is relieved against in Equity (*u*).

Care should be taken to make it apparent whether the reduced interest is to be accepted as often as paid within the time named, or whether the neglect on any one occasion

(*s*) *Ramsden* v. *Smith*, 2 Drew. 308. See Interp. 426.

(*t*) "Punctual" means on the day; *Leeds and Hanley Theatre, &c.* v. *Broadbent*, (1898) 1 Ch. 343.

(*u*) *Lady Holles* v. *Wyse*, 2 Vern. 289; *Herbert* v. *Salisbury & Yeovil Ry. Co.*, L. R. 2 Eq. 224; see *Wallis* v. *Smith*, 21 Ch. D. at p. 260; Leake, Contr. 939.

is to deprive the mortgagor of the benefit of the reduction on all future occasions.

The provision should be framed so that interest at the reduced rate does not become payable unless the mortgagor observes all his covenants other than those for payment of principal and interest, so as to secure the due performance of the covenants. (See form, 2 K. & E. 32.)

Continuance of loan for a time certain.

(*b*) The provisions for the continuance of the loan for a certain time are always made conditional on the regular payment of interest and performance of covenants by the mortgagor, and are generally followed by a declaration that the mortgagor shall not be entitled to pay off the money before the time fixed. (See forms, 2 K. & E. 33.)

On the question which sometimes arises, whether trustees who invest on mortgage are justified in lending the money for a time certain, see *Vickery* v. *Evans*, 33 Beav. 376.

Loan payable by instalments.

(*c*) The intention of the provisions for payment of the loan by instalments is that the instalments shall be regularly paid, and that in default of regular payment the mortgagee shall be at liberty to call in the unpaid part of the mortgage money. The most convenient mode of effectuating this intention is to insert the usual covenant for payment of the principal and interest at the end of six months, and then a proviso that, if the instalments be paid punctually on certain days, together with interest on the unpaid part of the mortgage money, the mortgagee will accept payment by the instalments, and will not call in the part not paid off. (See form X., 2 K. & E. 33.) A different plan is sometimes, though rarely, adopted. The primary covenant for payment is for payment by instalments (see form, 2 K. & E. 11); the proviso for redemption is that the mortgaged property shall be redeemable upon payment of the principal money and interest "by the instalments, at the times, and in manner hereinbefore mentioned, and pursuant to the covenant in that behalf hereinbefore contained." Then follows a proviso giving power to the mortgagee to call in the whole of the money in case the instalments and interest are not regularly paid.

The advantage of the former scheme is that, when the draftsman adopts it, he can use the ordinary clauses and provisoes, the meanings of which are well known, and he can then qualify them by a single proviso; the effect being that, if the instalments are not regularly paid, the mortgagee is remitted to all the rights which he would have had if the proviso had not been inserted; and this generally carries out the intention of the parties.

Declaration that moneys belong to mortgagees on a joint account.

(*d*) *As to the declaration that the moneys are advanced on a joint account and shall belong to the survivor.*—Suppose several persons to join in lending money on mortgage. If the mortgage was made before 1882, they were at law entitled jointly to the mortgage debt; but in Equity it would be presumed, in the absence of a "joint account clause," that they were entitled to separate shares of it, so that after the death of one of them the mortgagor paying off the debt was obliged to get a discharge from the personal representatives of the deceased person in respect of his share.

This rule was inconvenient when trustees lent money on mortgage; for the surviving trustees, being the persons to perform the trust, ought to have power to give a discharge for the mortgage money. If the mortgage deed had disclosed the trust, and shown that, in accordance with the trust, the survivors could give a receipt, this difficulty would not have arisen; but there was a formidable objection to a deed in this form, as, it appearing on the face of the deed that the mortgage money was trust property, the title of the mortgaged property might become affected by the rights of persons claiming under the trust. To avoid this, the trustees lent as if they were absolute owners (*r*), and a declaration was inserted that the money belonged to them on a joint account. In such cases the Court has always refused to make any inquiry into the trusts, though it is known that the presence of a joint account clause indicates that the mortgagees are probably trustees; see per Pearson, J., *Re Harman & Uxbridge &c. Ry. Co.*, 24 Ch. D.

(*r*) *Carritt* v. *Real and Personal Advance Co.*, 42 Ch. D. at p. 272.

at pp. 725, 726 (*w*). It was the practice to provide expressly that the receipt of the mortgagees, or the survivors or survivor of them, or of the executors or administrators of such survivor, or their or his assigns, should be a discharge; but this was really implied in the former part of the clause.

It may be objected that, as the mortgage deed was never executed by the mortgagees, the declaration would fail in effect, as never having been actually made by them. But the effect of the declaration was not to confer a legal right, but only to prevent the operation of an equitable doctrine: and Equity would have held that, if mortgagees advanced their money on a deed containing a certain stipulation, none of them could afterwards refuse to abide by it (*x*).

Where, in a mortgage made since 1881, mortgage money is expressed to be advanced by, or owing to, the mortgagees out of money, or as money, belonging to them on a joint account, or a mortgage after 1881 is made to the mortgagees jointly and not in shares, the money for the time being due on the mortgage is deemed to be money belonging to the mortgagees on a joint account as between them and the mortgagor; and the receipt in writing of the survivors or survivor, or the personal representatives of the last survivor, is good, notwithstanding notice to the payer of a severance of the joint account: C. A. 1881, s. 61, which applies if and so far as a contrary intention is not expressed in the mortgage, and subject to the terms of the mortgage.

In mortgages made before 1882 to persons lending moneys on a joint account, it was the practice to insert throughout the deed (except in the commencement of the covenants and in the words of limitation), after the names of the mortgagees, the words "or the survivors or survivor of

(*w*) As to effect of notice to a purchaser that the mortgagees are trustees, see *Re Blaiberg and Abrahams*, (1899) 2 C. H. 341.

(*x*) *Cheesebrough* v. *Wright*, 28 Beav. 283. The rule that a person who claims under a deed which he does not execute must give effect to all its provisions holds at law; *Rex* v. *Houghton-le-Spring*, 2 B. & Ald. 375; *Burnett* v. *Lynch*, 5 B. & C. 589; *Archard* v. *Coulsting*, 6 Man. & Gr. 75.

them, or the executors or administrators of such survivor, their or his assigns," so as to show clearly that the benefit of the provisions of the deed was to survive. But in mortgages since 1881 these words may be omitted in the covenants, as by the C. A. 1881, s. 60, a covenant with two or more, to do any act for their benefit, is to be deemed to include an obligation to do it for the benefit of the survivors or survivor of them, or of any other person to whom the right to sue on the covenant devolves, unless a contrary intention appears. If the mortgage contains express powers, some practitioners still provide expressly that they shall be exercisable by the "survivors, &c."

Contributory mortgage.

It often happens that several persons join in lending a sum of money which belongs to them, not on a joint account but in distinct shares, as one sum on the same mortgage; for when a large sum is to be borrowed, the solicitor who negotiates the loan may be unable to find any one person who is willing to advance the entire sum; while several smaller sums may readily be obtained. In this case the usual course is for the intending lenders to nominate some persons as trustees, who appear by the mortgage deed to advance the money in the usual manner, as if it belonged to them on a joint account, the contributories to the loan not being parties; and then the trustees declare by a separate deed that they hold the mortgage money on trust for the persons actually advancing it. (See 1 K. & E. 614.) There is an obvious risk in this course, for, as the trustees can give a receipt for the mortgage money they can get it paid off, and make away with it. The risk may be reduced to a minimum by taking proper precautions. In the first place, if three or more trustees of respectable position are chosen, the risk of their combining to appropriate the mortgage money is but small. In the next place, the persons advancing the money should see that the title deeds are not left in the actual possession of the trustees. They should be deposited with a solicitor or a banker. A very prudent lender might leave a request with the solicitor or banker that the deeds

should not be given up to the trustees without his knowledge; but in practice the latter precaution is not adopted.

Another course is to make the contributories parties, and to insert in the mortgage deed distinct covenants with each of them for payment of the moneys advanced by him. The conveyance is made to the contributories as joint tenants; the property is made redeemable on all the loans being repaid; the power of sale is made exercisable by each mortgagee, and the sale moneys are to be applied in payment rateably of the several sums advanced. See 2 Dav. Pre. Part II. p. 385.

A third course is to make the contributories parties, but to frame the mortgage as if the money were advanced to them on a joint account, with a declaration that the survivors or survivor of the mortgagees shall hold the mortgage moneys in trust for all the mortgagees as tenants in common, and to insert mutual covenants by the mortgagees to concur in calling in the money, and exercising all powers and remedies at the request of any one of them. The objection to this and to the first scheme is, that ultimately one person may become able to give receipts for the mortgage money, a situation giving him considerable facilities for committing fraud. This scheme is, however, a convenient plan to adopt where all the parties are above suspicion, and the amount of the mortgage money is but small. See 2 K. & E. 106.

*Group V.* The provisions for keeping up the value of the mortgaged property. Group V.

(*a*) Insurance against fire.

(*b*) Covenant to keep in repair.

(*c*) Power to lease.

(*a*) The clause providing for insurance against fire should always be inserted when a substantial part of the mortgaged property consists of buildings, machinery, or personal chattels. Insurance against fire (*y*).

It used to be considered that either the mortgagor or the mortgagee could, as being "a person interested,"

(*y*) As to the law of insurance against fire, see M. L. P. P. 147.

require the moneys payable under the policy in case of fire (whether there was a covenant to insure or not, and whether the policy was or was not effected pursuant to the covenant, if any) to be employed in reinstating any house or building insured (the Fires Prevention (Metropolis) Act, 1774, 14 Geo. 3, c. 78, s. 83: *Ex parte Gorely*, 4 De G. J. & S. 477); but it appears to be doubtful whether the 14 Geo. 3, c. 78, applies as between mortgagor and mortgagee (*z*); and whether it applies to houses outside the bills of mortality (as to which see "Wharton's Law Lexicon," s. v.); and therefore it is proper in the case of a house, and it was always proper in the case of machinery, or personal chattels (having regard to *Lees* v. *Whiteley*, L. R. 2 Eq. 143), to make express provision for the application of the moneys either in payment of the mortgage debt or in reinstating the mortgaged property. As to fixtures, see *Ex parte Gorely*, 4 De G. J. & S. 477.

Where a mortgage is made by deed since 1881 (*a*) the mortgagee has power, at any time after the date of the mortgage deed, to insure any mortgaged property of an insurable nature, and the premiums so paid by him are to be a charge on the mortgaged property and bear interest at the same rate as the mortgage money, C. A. 1881, s. 19, sub-s. (1) (ii); but (s. 23) the insurance is not to exceed the amount specified in the mortgage; or, if no amount is specified, two-thirds of the amount required, in case of total destruction, to restore the property insured, and the power is not to be exercised (1) when the mortgage contains a declaration that no insurance is required; (2) where an insurance is kept up by the mortgagor in accordance with the mortgage; (3) where the mortgage contains no stipula-

(*z*) *Westminster Fire Office* v. *Glasgow Provident Investment Society*, 13 App. Cas. at 714.

(*a*) Where a mortgage was made before 28 Aug., 1860, a mortgagee who insured not in pursuance of a contract and without the privity of the mortgagor, could not add the premiums to his security. But a power to this effect was given to him by Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 11 (2), which was repealed and replaced by C. A. 1881.

tion as to insurance, and the mortgagor insures to the amount in which the mortgagee is by the Act authorised to insure. Moneys received on an insurance under the mortgage or the Act are, if the mortgagee so requires, to be applied by the mortgagor in making good the loss or damage: or, without prejudice to any obligation to the contrary imposed by law or by special contract, the mortgagee may require such moneys to be applied in or towards payment of the mortgage money. All these provisions may (s. 19 (2) (3)) be varied, extended, or excluded by the mortgage.

If the mortgage contains no provisions as to insurance, and the mortgagee insures, it may turn out that the mortgagor had insured to the amount in which the mortgagee is authorised by the C. A. 1881 to insure; and in this case the mortgagee will be unable to charge the premiums of any insurance kept up by him. On the other hand, if the mortgagee does not insure, it may turn out that the mortgagor has not insured, so that in case of fire there would be a loss. It is therefore desirable to supplement the statutory provisions by inserting a covenant by the mortgagor to insure, to pay the premiums, and produce the policy and receipts to the mortgagee, with a declaration that on his omitting to produce the policy or receipts on demand the mortgagee shall be at liberty to exercise the statutory powers. See 2 K. & E. 45.

Covenant to repair.

(*b*) Where the covenant to repair is general, it may conveniently be amalgamated with the covenant to insure. A full discussion of covenants to repair will be found *post* in the chapter on LEASES.

Power to lease.

(*c*) The C. A. 1881, s. 18, enables either mortgagor or mortgagee, while in possession, (see s. 2 (vi.)) to grant agricultural or occupation leases for any term not exceeding twenty-one years, and building leases for any term not exceeding ninety-nine years, at the best rent, without fine, and with the usual restrictions (as to which see the section). Leases pursuant to the Act granted by a mortgagor, while in possession, are binding on all the incumbrancers (*b*); and

(*b*) *Wilson* v. *Queen's Club*, (1891) 3 Ch. 522.

granted by a mortgagee, while in possession, are binding on all prior incumbrancers, and on the persons interested in the equity of redemption (*c*). The power of leasing may be excluded or varied, and further leasing powers may be conferred on the mortgagor or the mortgagee, and are to be exercised, unless a contrary intention is expressed in the mortgage, as if they were conferred by the Act. It appears, however, that an express power to lease, not in accordance with the Act, cannot be exercised so as to affect the estate of any incumbrancer prior to the mortgage. The statutory powers arise only in the case of mortgages executed since 1881, but they can by agreement in writing between the mortgagor and mortgagee be applied to a mortgage made before 1882, though not so as to affect the interest of an incumbrancer who does not concur. (See form, 1 K. & E. 914).

If an express power of leasing is inserted, it should be given to the mortgagor till sale, entry by the mortgagee, or foreclosure, and to the mortgagee after entry by him. (See form, 2 K. & E. 46.) It is sometimes given to the mortgagor only.

A lease under the statutory power, or under an express power contained in a mortgage made since 1881, takes effect as a demise out of the estate of all the persons whom the Act enables the person exercising the power to bind (*d*); a lease under an express power in a mortgage before 1882, made by the mortgagor, took effect as an appointment of the use; but a lease made by the mortgagee took effect as a demise out of his estate.

When a lease is made under the power, whether express or statutory, the legal mortgagee is the person seised in reversion expectant on the term, and as such is entitled to the benefit of the proviso for re-entry contained in the lease; and after he has given notice to the tenant to pay rent to

(*c*) See C. A. 1881, s. 2 (vi), defining "mortgagor" as including any person deriving title under the original mortgagor or entitled to redeem a mortgage, &c.

(*d*) *Municipal &c. Building Society* v. *Smith*, 22 Q. B. D. 70.

him, he can distrain for non-payment, while at any time until the mortgagee has given notice to the tenant to pay rent to him, the mortgagor can sue for the rent in his own name (Judicature Act, 1873; 36 & 37 Vict. c. 66, s. 25, sub-s. 5), and can distrain for rent and justify as the mortgagee's bailiff (*e*).

Where a lease is made not under power.

It is convenient here to consider the remedies of a mortgagee or mortgagor for obtaining payment of rent in cases where a lease is made by a mortgagor not under the statutory or an express power.

1st. Where the lease is made before the mortgage.

In this case the effect of the mortgage deed is to transfer to the mortgagee the reversion expectant on the term demised, and with it the rent; and, if he chooses, he may give notice (*f*) to the tenant to pay the rent to him, and after giving notice, may enforce payment by distress. But suppose that, instead of giving notice, he permits the mortgagor to go on receiving the rent, the tenant is safe in paying it to the mortgagor (4 Anne c. 16, s, 10; Rev. Stat. 4 & 5 Anne, c. 3); and the mortgagor can sue for rent in his own name (Judicature Act, 1873, s. 25, sub-s. 5, also C. A. 1881, s. 10), and can distrain for it as the bailiff of the mortgagee (*Trent* v. *Hunt*, 9 Ex. 14).

The mortgagee, whether he has or has not given notice to the tenant to pay rent to himself, can enforce the proviso for re-entry contained in the lease, if the tenant pays neither mortgagor nor mortgagee.

2nd. Where the lease is granted after the mortgage, by the mortgagor alone.

Here the mortgagor can distrain for the rent, or under a proviso for re-entry he may maintain an action to recover possession, unless the mortgagee has given notice to the tenant to pay rent to him, and the tenant has by payment or other act signified consent; for, owing to the estoppel arising from the lease, the tenant cannot set up the mortgagee's title against the mortgagor, until the mort-

(*e*) *Trent* v. *Hunt*, 9 Ex. 14. (*f*) *Moss* v. *Gallimore*, Doug. 279.

gagee asserts it (see Judicature Act, 1873, s. 25, sub-s. 5). The mortgagee may eject the tenant by his title paramount; or he may distrain for non-payment of rent after he has given notice to the tenant to pay rent to him, and the tenant has by payment or other act signified consent, in which case he becomes a yearly tenant of the mortgagee (*g*). The mere fact of the tenant remaining in possession after notice is not sufficient to make him tenant to the mortgagee (*h*).

Group VI. *Group VI.* The clauses of this group, as inserted in mortgages prior to 1882, consisted of—

(*a*) The power of sale.

(*b*) The clause appointing a receiver.

Attornment clause (*i*). Formerly, where part of the property consisted of land, and was in hand, either an attornment clause or a power of distress was inserted. The effect of the attornment clause was to make the mortgagor the tenant of the mortgagee (*k*) at a rent, which was generally equal in amount to the interest, and thus to enable the mortgagee if the interest was not paid to distrain for the rent. The effect of the power of distress was to enable the mortgagee to distrain for the interest as if it were rent. By the Bills of Sale Acts, 1878 and 1882, clauses of this nature are to be deemed "bills of sale within the meaning of the Act of any personal chattels which may be seized or taken" (*l*) under them; and every bill of sale for securing the payment of money must be in a specified form (*m*) to which a mortgage of land cannot conform. These clauses have therefore fallen into disuse, except in mortgages which are made by a company and are capable of registration under the Companies Clauses

(*g*) *Corbett* v. *Plowden*, 25 Ch. D. 678.

(*h*) *Towerson* v. *Jackson*, (1891) 2 Q. B. 484.

(*i*) See 2 K. & E. 50, note.

(*k*) *Daubuz* v. *Lavington*, 13 Q. B. D. 347; *Re Willis*, 21 Q. B. D. 384; *Mumford* v. *Collier*, 25 Q. B. D. 279; *Green* v. *Marsh*, (1892) 2 Q. B. 330. The tenancy created by the attornment clause is determined by the death of the mortgagor; *Scobie* v. *Collins*, (1895) 1 Q. B. 375.

(*l*) 41 & 42 Vict. c. 31, s. 6. See M. L. P. P. 98.

(*m*) 45 & 46 Vict. c. 43, s. 9. See M. L. P. P. 102, 423.

Act, 1845, or the Companies Act, 1862; for such mortgages do not fall within the scope of the Bills of Sale Act, 1878 (*n*). But, as the effect of the attornment clause is to enable the mortgagee to recover possession of the land (R. S. C., Ord. III. r. 6) on non-payment of the rent, it may in some cases be advantageous to insert such a clause.

Power of sale.

(*a*) The mortgagee is at law the owner of the mortgaged property; but, as the mortgagor remains the owner in Equity, the mortgagee cannot sell it without some express power or statutory authority. Notwithstanding the statutory power of sale conferred on mortgagees by Lord Cranworth's Act (23 & 24 Vict. c. 145) in cases where the mortgage was made by deed, it was the usual practice to insert an express power of sale in mortgages made before 1882. Where a sale and conveyance were made pursuant to the power, the legal estate passed to the purchaser because the mortgagee was the owner at law, but the equitable interest passed because, and only because, the mortgagee was expressly authorised to convey it. In other words, the express power was inserted merely for the purpose of excluding the rule of Equity that the mortgagee could not sell so as to give a title against the mortgagor, and therefore it is sometimes called an equitable power (*o*). If a mortgagee who had no power to sell were to sell and convey to a purchaser, the latter would obtain the legal estate, but he would be liable in Equity to reconvey it to the mortgagor on being paid the amount due on the mortgage. The power of sale inserted in mortgages before 1882, when properly framed, consisted of seven clauses, most of which are retained in the express power of sale if inserted in a mortgage since 1881. See form in Stud. Prec. 54, note.

The authority to sell.

By the first of these authority to sell, at any time after the day appointed for payment, the mortgaged property, without the consent of the mortgagor, was given to the person or persons who should from time to time be

(*n*) *Re Standard Manufacturing Co.*, (1891) 1 Ch. 627.

(*o*) M. L. R. P. 300.

entitled to the mortgage debt; that is to say, to the mortgagee, "his executors, administrators, or assigns"; or, if there were several mortgagees, to them "or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns." The power was not given to the heir of the mortgagee, as he had nothing to do with the money, but was only a trustee of the legal estate in the land for the persons entitled to the mortgage debt.

It was necessary to give the power of sale to the assigns, because otherwise a devisee or transferee of the mortgage would not be able to exercise it (*Bradford* v. *Belfield*, 2 Sim. 264.)

If the mortgage was made subject to any existing charges, power was given to sell either subject to or free from existing charges, and in the latter case with power to pay them off out of the purchase money, or on any other terms of indemnity against them.

As, in the absence of any special direction in the power of sale, it was the duty of the mortgagee in selling under his power to sell under proper conditions, it was unnecessary to give him special authority to sell under such conditions; but such express authority was usually given in practice; and similarly, express authority was always given to sell either by public auction or private contract, although under a general power of sale not containing such express authority, the mortgagee might sell in either manner. This appears to be one of the many cases where the common forms include some words not actually essential to the operation of the deed, but convenient as pointing out the rights or duties of the parties acting under it.

Heir to concur in conveyance.

On the death of a mortgagee before 1882, his legal personal representative became entitled to the mortgage debt, while the legal estate in the land passed to his heir-at-law or devisee. The legal personal representative was the person to sell, but he could not convey the legal estate to the purchaser. It was therefore declared by the second clause in the power of sale that, on any sale under the

power, the person having the legal estate "shall make such assurances of the same for the purpose of effectuating such sale as the person or persons by whom the sale shall be made shall direct." It may be observed that the V. & P. A. 1874 (37 & 38 Vict. c. 78, s. 4), did not obviate the necessity of this clause; for the Act applied only to reconveyances on the payment off of the mortgage money (*Re Spradbery's Mortgage*, 14 Ch. D. 514). It is improper to insert the clause in an express power of sale in a mortgage of freeholds since 1881, for the mortgaged land vests in the legal personal representatives of the mortgagee (*ante*, p. 148). But it should be inserted in a mortgage of copyholds, as the legal estate devolves, on the death of a mortgagee who is tenant on the rolls, to his customary heir (*p*).

Power not to be exercised until certain events.

If the interest is paid regularly, and if the principal is paid off on proper notice, there is no reason for allowing the mortgagee to sell the property, and accordingly a clause (the third in order) was inserted which provided that the power should not be exercised—*first*, till default should be made in payment of "some moneys intended to be hereby secured," [*i.e.*, not before the day named in the covenant for payment,] and notice should be given in writing to the mortgagor to pay off the moneys for the time being owing on the mortgage, and default should be made in such payment for six calendar months; or *secondly*, until some payment of interest should be in arrear for three calendar months. Sometimes the power was made exercisable if default was made in keeping up the insurances.

A mortgagee exercising a power of sale is not a trustee of the power, and is in a very different position from a trustee for sale. He is bound to sell fairly and to take reasonable steps to obtain a proper price; but he may proceed to a forced sale for the purpose of paying the mortgage debt (*q*).

(*p*) Copyhold Act, 1894, s. 88, replacing the Copyhold Act, 1887, s. 45

(*q*) See *Farrar* v. *Farrars Limited*, 40 Ch. D. 395, at pp. 398, 410—411; *Kennedy* v. *De Trafford*, (1897) A. C. 180; *Nutt* v. *Easton*, (1899) 1 Ch. 873.

It is of importance that the mortgagee should not be hampered, when he wishes to give notice, by any difficulty in finding the person to whom it is to be given, and for this reason it was usually provided that the notice should be sufficient if left on any part of the mortgaged premises, or sent by post to the mortgagor at his last known place of abode in England; and that it should be sufficient if not addressed to any person in particular; for, after the death of the mortgagor, the mortgagee might not know to whom it ought to be addressed.

In some few cases, chiefly when the mortgage was an extremely insufficient security for the debt, and sometimes in a mortgage to secure an account current at a banker's, the whole of the clause under consideration was omitted, so as to enable the sale to be made without any notice to the mortgagor, whenever the mortgagee thought fit.

Purchaser protected against improper sale.

It might sometimes be extremely difficult to produce satisfactory evidence to a purchaser that any event had happened upon which, according to the proviso, the power of sale was to be exercisable: and therefore a clause (the fourth) was inserted expressly declaring that every sale purporting to be made under the power of sale should be valid as regards the purchaser, and that the remedy of the mortgagor in respect of any improper sale should be in damages only, *i.e.*, leaving him to his personal remedy against the mortgagee. This clause does not protect a purchaser who knows of an irregularity which cannot have been waived (*r*).

Receipt for purchase moneys.

The receipt clause (the fifth) provided that the mortgagee, his executors, administrators, or assigns, might give an effectual discharge to the purchaser for the purchase money arising on any sale.

This clause was inserted to prevent the application of the

(*r*) *Selwyn* v. *Garfit*, 38 Ch. D. 273; *Re Thompson and Holt*, 44 Ch. D. 492.

rule of Equity (now for the most part done away with by statute) that a person paying money to another who is, to his knowledge, not the absolute owner of it, is bound to see that the latter applies it properly. This would cause considerable difficulty in carrying out a sale under the power, for a purchaser would be obliged to investigate the state of accounts between the mortgagor and mortgagee, and to see that the latter paid to the former so much of the purchase money as belonged to him. The effect of the accidental omission of the clause appears to have been guarded against by the Law of Property Amendment Act, 1859, commonly called "Lord St. Leonards' Act" (22 & 23 Vict. c. 35, s. 23).

Application of purchase moneys.

By the sixth clause the mortgagee was directed to apply the purchase money, in the first place, in defraying the expenses of the sale; and, in the next place, towards paying off the moneys due on the mortgage; and to pay the surplus, if any, to the mortgagor. The mortgagee must at his own risk find out to whom the surplus is payable. Where the mortgage was of realty only, the surplus was made payable to the mortgagor, "his heirs, or assigns"; if it was of personal estate, to the mortgagor, "his executors, administrators, or assigns"; and if of both real and personal estate, to the mortgagor, "his executors, administrators, or assigns," with a distinct declaration that it was to be paid as *personal estate*, so as to prevent the mortgagee from being involved in any dispute between the real and personal representatives of the mortgagor as to the person to whom he ought to pay the surplus.

By the seventh clause it was declared that any one entitled to give a receipt for the mortgage moneys might exercise the power of sale.

There is some doubt whether a second mortgagee is such a complete assign of the mortgagor as to be able to give a receipt to the first mortgagee for the surplus proceeds of a sale under an express power in the first mortgage.

(See this question discussed, 2 Dav. Prec., Part II. p. 448, note: and see *Re Foligno's Mortgage*, 32 Beav. 131.) It was therefore convenient to insert in a second mortgage an express power enabling the mortgagee to give a receipt for the surplus proceeds of a sale under the power contained in the first mortgage.

Statutory power of sale.

The power of sale and the ancillary clauses are now usually omitted in reliance on the provisions of the C. A. 1881, ss. 19, 20, 21, and 22, which give to a mortgagee (s. 19), where the mortgage is made *by deed* since 1881, power (to the like extent as if the power had been conferred by the deed, but not further) when the mortgage money has become due, to sell, or concur with any other person in selling the mortgaged property, either subject to prior charges or not; with provisions as to the mode of sale, similar to those usually contained in the express power; and to convey to the purchaser and to give a receipt for the purchase money.

It should be remembered that the term "mortgagee," as defined by the Act, s. 2 (vi.), includes any person from time to time deriving title under the original mortgagee, and therefore includes the personal representatives and other "assigns" of the mortgagee. Moreover, by s. 21 (4), the statutory power of sale is expressly made exercisable by any person for the time being entitled to receive and give a discharge for the mortgage money; by s. 61, in the case of a mortgage to persons advancing money on a joint account, the right to give a receipt passes to the survivor; and, by s. 21 (3) and s. 22, any surplus proceeds of a sale made by a mortgagee can be paid to a subsequent incumbrancer and he can give a valid discharge for them. The power of sale and the subsidiary powers may be varied or extended, or negatived, by the mortgage deed; and, if varied or extended, operate as far as may be as if the variations or extensions were contained in the Act; s. 19 (2), (3). See the forms, 2 K. & E. 20 *et seq.*

The mortgagee is not to exercise the statutory power of

sale unless and until one of the following events has happened (s. 20), viz.:—

(1.) Notice requiring payment of the mortgage money has been served on the mortgagor (see definition, s. 2, vi.), or one of the several mortgagors; and default has been made in payment of the mortgage money, or of part thereof, for three months after such service (*s*).

The words "one of the several mortgagors" give rise to some difficulty, having regard to the definition (*ante* p. 160, note (*c*) of "mortgagor," which includes a second and any subsequent mortgagee. Apparently, where a mortgagee has notice of a subsequent incumbrance, though the words of the Act allow notice either to the mortgagor or to the subsequent incumbrancer, it would not be safe for him to sell without giving notice to both (*t*).

(2.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due.

(3.) There has been a breach of some provision, contained in the mortgage or the Act, and on the part of the mortgagor, or some person concurring in the mortgage, to be observed or performed, other than the covenant for payment of the mortgage money or interest.

(It is doubtful whether there is any provision "in the Act" to be performed by the mortgagor.)

If it is intended, as is usually the case, that the power of sale is to become exercisable on the mortgagor neglecting to keep up the insurances, a covenant by him to insure should be inserted.

S. 21 (2) protects a purchaser against an improper sale (*u*).

(*s*) *I.e.*, calendar months, M. L. R. P. 155, n. (*i*). The day on which the notice is given is excluded from the computation. *Re Railway Sleepers Supply Co.*, 29 Ch. D. 204. See s. 67 as to the form of and method of serving notice.

(*t*) Consider *Hoole* v. *Smith*, 17 Ch. D. 434, a case on the express power of sale.

(*u*) *Dicker* v. *Angerstein*, 3 Ch. D. 600; unless he knows of an irregularity in the sale which

By s. 21 (3) the moneys received by the mortgagee, after discharge of prior incumbrances to which the sale is not made subject, or after payment into Court (see s. 5) of a sum to meet any prior incumbrance, are to be held by him in trust to be applied by him in payment of costs of the sale, or any attempted sale, in discharge of the mortgage money, interest, and costs, and in payment of the surplus to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof, words which include subsequent incumbrancers; see the definition of "mortgagor," s. 2 (vi.), *ante*, p. 160, note, and see s. 22. It is often convenient in a second mortgage to provide as to the form in which prior incumbrances are to be provided for (see 2 K. & E. 29, note).

Where the mortgage includes both real and personal property, different persons may on the death of the mortgagor intestate become entitled to the respective properties; and therefore it appears proper in such a case, where the statutory power is relied on, to declare in the mortgage that the surplus shall be payable "to the mortgagor, his executors, administrators, or assigns, as personal estate." See 2 K. & E. 28.

By s. 21 (5), (6), (7), the statutory power of sale is not to affect the right to foreclosure; and the mortgagee is protected against involuntary losses in the exercise of the power, and may, after the statutory power of sale has become exercisable, recover from any person any muniments of title which a purchaser under the power of sale would be entitled to recover from him.

Statutory power to appoint receiver (*x*).

By the C. A. 1881, s. 19 (iii.), a mortgagee, where the mortgage is made *by deed* since 1881, has power (to the like extent as if the power had been conferred by the mortgage but not further) when the mortgage money has become due, to appoint a receiver of the income of the

cannot have been waived; *Parkinson* v. *Hanbury*, 1 Drew. & Sm. 143; *Selwyn* v. *Garfit*, 38 Ch. D. 273; *Re Thompson and Holt*, 44 Ch. D. 492.

(*x*) See M. L. R. P. 207.

mortgaged property or of any part thereof; but he may not exercise the power until he has become entitled to exercise the power of sale conferred by the Act. (See s. 24, which contains a statement of the powers and duties of the receiver.)

An appointment under the statutory power is made by writing under the hand of the mortgagee; s. 24 (1). It usually takes the form of an agreement between the mortgagee and the receiver, and contains a recital of the mortgage, stating the covenants for payment of principal and interest after default, the conveyance, proviso for redemption, provisions affecting the time of payment or rate of interest, and provisions for keeping up policies of fire insurance, and that the mortgagee is desirous "of appointing the said B. to be receiver of the rents and profits of the said mortgaged premises." The operative words are—"the said A., by virtue of the power conferred on him by the Conveyancing and Law of Property Act, 1881, and of every other power, &c., doth hereby appoint the said B. to be receiver of the rents, profits, and income of all the property comprised in or subject to the hereinbefore recited indenture of mortgage." The instrument states the amount of the commission, which may not (s. 24 (6)) exceed five per cent. of the moneys received by the receiver; and, if so intended, a direction to keep up insurances. (See s. 24 (7).)

Statutory provisions for appointing a receiver are given by Lord Cranworth's Act, 23 & 24 Vict. c. 145 (which is repealed by the C. A. 1881, s. 71, but remains in force as to mortgages before 1882).

In cases where it is likely that a receiver will have to act, it is usual to appoint him at the time when the mortgage is made; with a proviso, if he is not intended to act immediately, that he is not to act until some interest is in arrear for a month, or until the mortgagor shall have broken some covenant other than the covenants for payment.

Receivership deed.

The appointment may be included in the mortgage deed;

but the usual practice is to make it by a separate deed, generally called "a receivership deed." The advantage of this course is that the deed can conveniently be placed in the custody of the receiver, and produced by him, when necessary, to the tenants, while the mortgage deed may be kept by the mortgagee in his own possession.

The case where it is desirable to appoint a receiver at the time of making the mortgage is where the property is not in the mortgagor's own possession, but is let to several tenants. The receiver, who, though formally appointed by the mortgagor, is really the nominee, generally the solicitor, of the mortgagee, does nothing so long as the interest is paid regularly; but, as soon as any payment becomes in arrear for the time specified in the deed (usually one calendar month), he acts, and by virtue of the deed collects the rents, and after deducting his salary, keeps down the interest, and pays the surplus to the mortgagor. If the appointment is not contained in the mortgage, it contains a recital of the mortgage, similar to that in an appointment under the statutory power, and a recital that on the treaty for the mortgage it was agreed that a receiver should be appointed.

The following is an analysis of the operative part of an appointment of a receiver by agreement.

Analysis of deed of appointment of receiver.

(α) The mortgagor, with the privity of the mortgagee, appoints "the said A.," his attorney, to collect the rents, and to use all lawful remedies for recovering them, and directs the tenants to pay accordingly.

(β) The receipts of the receiver, or of any future receiver for the rents, are declared sufficient.

(γ) The trusts of the moneys received are that the receiver, after payment of all outgoings and insurances, and keeping down the interest on any charges prior to the mortgage debt, shall retain such sum, not exceeding £5 per cent., as the mortgagee shall allow for his salary, and shall then pay the interest falling due on the mortgage money; and lastly, shall pay the surplus to the

mortgagor. Sometimes power is given to the receiver, when required by the mortgagee, to pay the surplus into a bank as a fund to provide for the interest as it becomes due.

(δ) The receiver covenants to do his duty.

(ε) The mortgagor covenants—

1st. Not, without the consent of the mortgagee, to revoke the powers given to the receiver, or any future receiver.

2nd. To concur with the mortgagee, when requested, in the appointment of a new receiver.

(ζ) Power to the mortgagee to appoint a new receiver on the mortgagor's neglect to do so when requested.

(η) The mortgagee is declared not to be liable for any losses occasioned by the receiver, which are to be borne by the mortgagor, who is to pay the receiver's salary.

(θ) The receiver is not to act till some interest is in arrear for one calendar month.

Sometimes, for brevity, the appointment is made by reference to the statutory power (see 2 K. & E. 56). If this is done, care should be taken to consider whether the powers conferred by statute on a receiver appointed under the statutory power are sufficient; and, if not, additional powers should be given to him (see 2 K. & E. 56).

If any tenant refuses to pay rent to the receiver, the latter can distrain in the name of the mortgagee. But he cannot grant leases or manage the estate; and, apparently, cannot enter for non-payment of rent, unless express power be given to him.

*Group VII.* This consists of a single clause declaring that the mortgagee shall not be liable for any involuntary losses in the execution of any of the powers or trusts of the deed, or conferred on him by statute. In many collections of precedents this clause is printed as part of the power of sale. It should be remembered that the indemnity given

Group VII.

to the mortgagee by the C. A. 1881, s. 21 (6) applies only to losses happening in the exercise of the statutory power of sale and the trusts connected therewith.

Group VIII. Covenants for title.

*Group VIII.* The covenants for title. These may be expressed or implied under the C. A. 1881, s. 7, by the mortgagor conveying "as beneficial owner."

These covenants, whether express or implied, differ from those in a purchase deed mainly in being absolute instead of qualified (see M. L. R. P. 221, 377). The only points requiring notice are that the covenant for quiet enjoyment is made to commence after default in payment of the mortgage money, and that the covenant for further assurance is to be performed at the expense of the mortgagor in the express covenant till "foreclosure or sale," in the implied covenant "so long as any right of redemption remains," under the mortgage; and afterwards, whether the covenants are express or implied, at the expense of the person requiring performance of the covenant.

Where a trustee joins in the mortgage, and it is intended to imply a covenant against incumbrances by him, this can be done by making him convey "as trustee," &c., see *ante*, p. 109.

It is now the usual practice to rely on the implied covenants, which, it should be remembered, can only be implied in mortgages by deed. It would seem that, by virtue of the large definitions of "conveyance" and "mortgage" in the Act (see s. 2), they can be implied in an equitable mortgage if effected by deed.

Receipt indorsed.

Formerly a receipt by the mortgagor was indorsed on the mortgage deed. But this is unnecessary at the present day, *ante*, p. 86.

Statutory mortgage.

The C. A. 1881 contains in the 3rd schedule a form of mortgage of freeholds or leaseholds, called a 'statutory mortgage." The form is very concise, as the covenants for payment of principal and interest and the proviso for redemption are implied. This form of mortgage is employed only for small transactions.

We now pass to the consideration of the frame of mortgage deeds of interests in land, as modified by the tenure of the land.

Copyholds (*y*).

A mortgage of copyholds resembles in substance a mortgage of freeholds, but it takes the form of a surrender conditioned to be void on payment of the debt and interest on a named day, on which surrender, if necessary, an admittance can be taken (*z*). As the conditional surrender is not a deed, the covenants for title cannot be implied, and no power of sale arises. It is therefore necessary that besides the surrender there should be a deed containing covenants for title, express or implied, and conferring the power of sale. If, as is usually the case, the deed precedes the surrender, it consists of a covenant to surrender to the use of the mortgagee, subject to a proviso making void the surrender on payment on the named day, and contains the usual covenants by the mortgagor for payment of principal and interest. As a covenant to surrender is a "conveyance" within the meaning of the C. A. 1881, s. 2 (v.), it confers a power of sale, and the covenants for title can be implied by making the mortgagor covenant to surrender "as beneficial owner," *ante*, p. 174. It is the practice to add a declaration by the mortgagor that he will stand seised of the mortgaged property until surrender on trust for the mortgagee, his heirs and assigns, "subject to such equity of redemption as the same premises would have been subject to if such surrender had been made." But this is not absolutely necessary, as even in the absence of such a declaration the mortgagor becomes a trustee for the mortgagee, and the latter or any person claiming under him can obtain the legal estate by a vesting order, or probably by an order appointing some person to convey the land under the Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 25, 33, 34 (*a*). A power of attorney

(*y*) See 37 Sol. J. 712.

(*z*) See the forms of mortgage and conditional surrender, Stud. Prec. 56, 59 ; 2 K. & E. 71, 73.

(*a*) *Re Crowe's Mortgage*, L. R. 13 Eq. 26 ; *Re Cuming*, L. R. 5 Ch. 72.

expressed to be irrevocable (see the C. A. 1882, s. 8) may also be given by the mortgagor enabling the mortgagee to make the surrender.

The surrender is an essential part of the security. If the matter is allowed to remain in covenant only, a subsequent mortgagee, who takes a conditional surrender and who advances his money without notice of the prior mortgage effected by covenant to surrender only, will have priority (*b*). It is therefore expedient not to advance the money until the surrender is actually made. It must not be thought that a covenant to surrender is useless. On the contrary, it forms a perfectly good equitable security; and therefore confers on the mortgagee a right to have a surrender made to his use by the customary heir of, by volunteers claiming under, by the trustee in bankruptcy of, the mortgagor, and by a subsequent purchaser from him with notice of the mortgage (*c*). Sometimes, though rarely, the mortgage deed follows the surrender. In this case it is not a conveyance, so that the covenants for title cannot be implied and no power of sale arises, and it consists of covenants for payment, an express power of sale, and covenants for title.

Generally, the mortgagee is not admitted on the conditional surrender, because fines and fees would be payable on his admittance, and also on the surrender to the use of the mortgagor, and his admittance thereon, when the debt is paid off. The mortgagee incurs no risk by not being admitted; for, on his admittance, his title relates back to, and becomes perfect against any mesne surrenderee as from the date of the surrender (*d*).

Death of mortgagee.

When the mortgagee has been admitted under the conditional surrender, and then dies, the right to be admitted devolves on his customary heir, as the mortgagee

(*b*) *Oxwick* or *Oxwith* v. *Plummer*, Gilb. Eq. Rep. 13; 5 Bac. Abr. (7th ed.), 664.

(*c*) *Spencer* v. *Boyes*, 4 Ves. 369; *Martin* v. *Seamore*, 1 Ca. Ch. 170; *Taylor* v. *Wheeler*, 2 Vern. 564; *Jennings* v. *Moore*, 2 Vern. 609.

(*d*) *Holdfast* v. *Clapham*, 1 T. R. 600.

was tenant on the Court Rolls (*e*). On the death of the mortgagee before admittance, the right to be admitted devolves on his personal representatives, as the mortgagee was not tenant on the Rolls (*f*). Where the mortgagee has not been admitted, if the mortgagor dies (being tenant on the Rolls), either his customary heir or the mortgagee (under the conditional surrender) can be admitted; if both mortgagor and mortgagee die, either the customary heir of the mortgagor or the personal representatives of the mortgagee can be admitted; but it is the practice for the heir to be admitted.

When the mortgagee has not been admitted, it is the practice, on the mortgage being paid off, to enter an acknowledgment of satisfaction (see Stud. Prec. 76) on the Court Rolls, which is considered to be sufficient evidence of the repayment of the mortgage money to vacate the surrender. A receipt should also be indorsed on the deed accompanying the surrender.

If the copyhold be held for lives, the deed should contain the usual provisions for renewal and payment of the fines.

Leaseholds.

Mortgages of leaseholds are effected either by assigning the land for the whole term to the mortgagee, or by demising it to him for the whole term except the last day or last few days (called the nominal reversion), subject in either case to redemption (*g*). In the former case the mortgagee becomes liable, as being the assign of the lessee (*h*), to pay the rent and perform the lessee's covenants; but the lease is not liable to be forfeited by any act or omission of the mortgagor which if done or made by the legal owner of the term would create a forfeiture. In the latter case the mortgagee is not liable to pay the rent or perform the covenants of the lessee, though he may sometimes in practice be forced

(*e*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88; replacing the Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45.

(*f*) C. A. 1881, s. 30; *Re Hughes*, W. N. (1884), 53; *Hall* v. *Bromley*, 35 Ch. D. 642.

(*g*) Stud. Prec. 60; 2 K. & E. 75.

(*h*) *Williams* v. *Bosanquet*, 1 Brod. & Bing. 238.

to do so in order to avoid a forfeiture of the term; but the lease is liable to forfeiture by any act or omission by the mortgagor which if done or made by the legal owner of the term creates a forfeiture. In either case the lease may be forfeited by any act or omission of the mortgagor which if done or made by the person in possession creates a forfeiture.

If the rent and covenants are not onerous, the mortgage should be made by assignment, so as to avoid, as far as can be, the risk of a forfeiture by some act or omission of the mortgagor. On the other hand, if they are onerous, it is better to make the mortgage by demise, so as not to place the mortgagee under any personal liability to the lessor.

We have now to consider the consequences of the mortgagor becoming bankrupt.

Effect of disclaimer by trustee in bankruptcy (*h*).

Even if the amount due on a first mortgage leaves an ample margin of value, so that, as between the first mortgagee and the trustee in bankruptcy of the mortgagor, the lease may be of value to the former, yet the amount due for rent and on subsequent mortgages may be such as to render the lease onerous to the latter; and, if this is the case, the trustee may (under the Bankruptcy Act, 1883, s. 55) disclaim the mortgagor's interest in the lease if the mortgage was made by demise, so that the legal interest in the lease is vested in him; but not if the mortgage was made by assignment (*i*). The disclaimer determines as from the date thereof the rights or liabilities of the bankrupt and his property, and discharges the trustee from all personal liability as from the time when the property vested in him, but does not affect the rights or liabilities of any other person. The Court may on the application of any person interested in the lease make an order vesting it in him upon the terms of making him subject to the same liabilities and obligations as the bankrupt was subject to under the lease at the date of the bankruptcy petition. The Court has power to make the vesting order on such terms as it thinks just.

(*h*) See 42 Sol. J. 210, 228. (*i*) *Re Gee*, 24 Q. B. D. 65.

The practical result is that, if the mortgage is made by assignment, the mortgagee's interest is not affected by the bankruptcy of the mortgagor; but if it is made by demise, he may have to choose between having the lease vested in him and losing his security (*k*).

Trust of nominal reversion.

In order to avoid the risk of the forfeiture of the lease by the disclaimer of the trustee in bankruptcy of the mortgagor where the mortgage is made by demise, the following clauses may be added: (1) A declaration of trust of the nominal reversion by the mortgagor in favour of the mortgagee; (2) a power of attorney authorising the mortgagee to assign the nominal reversion to himself or any other person, subject to the equity of redemption, if any; (3) power to the mortgagee to appoint a new trustee of the nominal reversion as if the mortgagor were dead (see form 2 K. & E. 30). Although the first of these clauses does not prevent the trustee in bankruptcy from disclaiming the lease (*l*), the second clause enables the mortgagee at any time before the disclaimer is made to vest the nominal reversion in himself; and the third clause, which the student will not understand until he has perused APPOINTMENTS OF NEW TRUSTEES, *post*, p. 494, enables the mortgagee at any time before the disclaimer is made to appoint a new trustee of the nominal reversion, and by means of a vesting declaration to vest the nominal reversion in him without the concurrence of the mortgagor (*m*), the result being in either case to enable the mortgagee to prevent the disclaimer from operating on the legal term, or, in other words, from affecting the mortgagee. With these additions a mortgage by demise is practically safe in case of the bankruptcy of the mortgagor,

(*k*) *Ex parte Finley*, 21 Q. B. D. 475; *Ex parte Hepburn*, 25 Q. B. D. 536. As to the position of the mortgagee after the lease is vested in him, see *Ex parte Finley, ubi sup.*; *Re Morgan*, 22 Q. B. D. 592; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13. And see Davidson's Concise Precedents (17th ed.), 181, note (*b*).

(*l*) *Re Maughan*, 14 Q. B. D. 956.

(*m*) See *London, &c.* v. *Goddard* (1897), 1 Ch. 642.

and may be recommended for use in all cases except where the liability under the lease is nominal.

Covenants.

Care must be taken in a mortgage by demise not to insert any covenants as to insurance or otherwise repugnant to those in the head lease. Thus if the covenant in the head lease is to insure in the name of the lessor, the covenant in the mortgage must not be to insure in the name of the mortgagee, for then the mortgagor would have to keep up two insurances instead of one.

Power of sale.

The express power of sale, if inserted, should be made exercisable not only in the events in which it is exercisable in the case of freeholds, but also on breach by the mortgagor of any of the covenants in the lease.

Life estates.

Prior to 1883 mortgages of life estates in realty were effected by demise for a term, instead of assignment, owing to an opinion generally held that, after an absolute assignment, all powers appendant to the life estate ceased to be exercisable. The operative words were "bargain, sell, and demise," which (there being a bargain and sale of a chattel interest for value) raised a use, and therefore vested the legal estate for the term in the mortgagee without inrolment under the Statute of Inrolments (*ante*, p. 12) and without entry (*ante*, p. 13). The *habendum* was "unto [*the mortgagee*] his executors, administrators, and assigns for ninety-nine years, if the mortgagor should so long live," and then followed a proviso for redemption. It has, however, been decided that the form of the mortgage is immaterial; that the powers annexed to the life estate remain exercisable notwithstanding the assignment, but only with the consent of the mortgagee if such exercise might be to his prejudice (*n*). Mortgages of life estates since 1882 are always made by assignment, as the powers vested in the tenant for life by the S. L. Acts, 1882 to 1890, remain exercisable by him notwithstanding the mortgage, though not so as to affect the interest of the mortgagee without his consent, except that

(*n*) *Alexander* v. *Mills*, L. R. 6 Ch. 124; *Re Bedingfeld and Herring's Contract* (1893), 2 Ch. 332.

his consent is not required to leases at rack-rent made by a mortgagor in possession; S. L. A. 1882, s. 50.

Interpretation clause.

The phrase "the said [*mortgagor*] his heirs and assigns," or in the case of leaseholds or personalty, "the said [*mortgagor*] his executors, administrators, and assigns," and in the case of both freeholds, leaseholds, and personalty, "the said [*mortgagee*] his executors, administrators, and assigns," or in the case of mortgages on a joint account, "the said [*mortgagees*] or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns," constantly recurs throughout the mortgage, though in mortgages made since 1881 the latter phrase is rarely, if ever, necessary. Various plans have been suggested for avoiding this. Sometimes an interpretation clause is inserted, either at the beginning or at the end of the deed (2 K. & E. 61, note (*c*)), defining the words "mortgagor," and "mortgagee," or "mortgagees," so as to include (where such interpretation is not excluded by or repugnant to the context) in the case of the mortgagor, his heirs and assigns; or, for leaseholds or personalty, his executors, administrators, and assigns; and, in the case of the mortgagee, his executors, administrators, and assigns; or, in the case of several mortgagees, the survivors or survivor of the mortgagees, and the executors or administrators of such survivor, their or his assigns. If this is done, the words "heirs and assigns," or for leaseholds or personalty the words "executors, administrators, and assigns," occurring alone will, in the case of the mortgagor, be omitted; and the words "executors, administrators, and assigns," in the case of the mortgagee, and the words "the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns" in the case of the mortgagees, will be omitted: but, wherever the words "heirs, executors, and administrators" occur together in the full forms, whether in the case of the mortgagor, mortgagee, or mortgagees, they will be retained. In mortgages of freeholds or copyholds, the words "heirs and assigns" must, in the case of the

mortgagee or mortgagees be retained wherever they occur in the full forms, because the definition of the mortgagee or mortgagees excludes the heirs. It has been suggested (2 K. & E. 61, note (*c*)) that as, owing to the similarity of the words "mortgagor" and "mortgagee," there is a risk of clerical errors from their employment, it might be better to substitute other words, such as "owner" and "mortgagee," or "debtor" and "creditor."

Costs.

It is worth noticing that, although it is the invariable practice for the mortgagor to pay the costs of the mortgagee, even if the negotiation goes off so that no mortgage is ever effected, there is, in the absence of any special agreement (see the form 2 K. & E. 254), no such privity between the mortgagor and the mortgagee's solicitor as to enable the latter to recover his costs as against the mortgagor; he has a remedy against his own client, the mortgagee, who has his remedy over against the mortgagor (*o*).

(*o*) *Rigley* v. *Daykin*, 2 Y. & J. 83; *Wilkinson* v. *Grant*, 18 C. B. 319; *Pratt* v. *Vizard*, 5 B. & Ad. 808; *Re Roberts*, 43 Ch. D. 52. As to the costs of a solicitor mortgagee, see the Mortgagees' Legal Costs Act, 1895 (58 & 59 Vict. c. 25), and the note 2 K. & E. 61.

## CHAPTER VII.

### ASSIGNMENTS AND MORTGAGES OF PERSONALTY.

PERSONAL property can be divided (see M. L. P. P. 1, Wms. P. P. 27) into that which has an actual physical existence, as moveable chattels, and that which is incorporeal and has only a notional existence. Property of the latter kind is often called a *chose in action;* but, strictly speaking, this phrase should be restricted to certain kinds only of property having a notional existence.

### PART I.—PERSONAL CHATTELS.

Transfer of property in personal chattels.

The property in personal chattels may be transferred by delivery or by a deed. In either case the transfer may be voluntary, *i.e.*, by way of gift, or for valuable consideration, *i.e.*, on a marriage, or on a sale or mortgage. The subject of transfers effected otherwise than by deed is discussed fully in M. L. P. P., chapters iii. to vi. inclusive, and in Wms. P. P. Pt. I. chap. ii.

Bill of Sale.

A deed by which the property in personal chattels is transferred is called a "Bill of Sale"; but, as a Bill of Sale is very rarely used except on the occasion of a mortgage of chattels, the phrase used without explanation generally means such a mortgage. It should be observed that, though the property in the mortgaged chattels is transferred, the possession is retained by the mortgagor; whereas if goods are pledged, they are given into the possession of the lender (*a*).

(*a*) *Mills* v. *Charlesworth* 25 Q. B. D. 421, at p. 424.

Mortgage Bills of Sale (*b*).

Mortgages (not including debentures of companies) of personal chattels are subject to certain requirements under the Bills of Sale Acts, 1878 and 1882 (41 & 42 Vict. c. 31, and 45 & 46 Vict. c. 43). By "personal chattels" are meant, for the purposes of these Acts, goods, furniture, and other articles capable of complete transfer by delivery, including "trade machinery," *i.e.*, machinery used in any workshop or factory (not being fixed motive power, fixed power machinery, or pipes for steam, gas, or water): and also, if assigned or charged by an instrument not containing a conveyance of or charge on the buildings or land to which they are annexed, fixtures and growing crops. A mortgage Bill of Sale is void, except as against the grantor, in respect of ($\alpha$) chattels not specifically described in a schedule, ($\beta$) chattels of which the grantor was not the true owner at the time of the execution of the Bill of Sale; but this does not apply to crops growing at the time of execution of the mortgage, nor to fixtures, plant, or trade machinery substituted for those specifically described.

The mortgage is absolutely void ($\alpha$) unless the consideration is truly stated, ($\beta$) if it be given for a sum under £30, ($\gamma$) unless the execution by the grantor is attested by one or more credible witnesses not being parties, ($\delta$) unless it is registered under the Act of 1878 within seven clear days after execution (*c*), ($\epsilon$) in cases where it is security for payment of money by the grantor, unless it is made in accordance with the form given in the schedule to the Act of 1882. (See M. L. P. P. 102.)

Volunteers.

A Bill of Sale not for value, made by a person in insolvent circumstances at the time of making it, will be void against creditors under 13 Eliz. c. 5. (See *ante*, p. 72.)

Assignor remaining in possession.

Although no delivery of the goods comprised in a Bill of Sale is necessary for the purpose of changing the ownership

(*b*) See the discussion of the law as to Bills of Sale by way of mortgage in M. L. P. P. ch. vii. p. 93; 2 K. & E. 146, note; 36 Sol. J. 740, 751.

(*c*) The registration must be renewed once at least every five years, or it will become void.

as between the parties, it used to be considered that, if the assignor remained in possession of the goods, the deed, even if made for valuable consideration, would be void against creditors, under 13 Eliz. c. 5: but the modern doctrine is that the fact of the assignor remaining in possession of the goods does not necessarily render the deed fraudulent and void as against creditors; and that, where the remaining in possession is consistent with the nature of the transaction, the deed is valid (*Martindale* v. *Booth*, 3 B. & Ad. 498; *Steward* v. *Lombe*, 1 Brod. & B. 506). For instance, if A. assigns his furniture absolutely to B., and remains in possession, the deed is void against creditors (13 Eliz. c. 5); but, if the assignment is made by way of mortgage, this is not the case, as the remaining in possession is consistent with the terms of the deeds and the nature of the transaction. (See M. L. P. P. 94).

Order and disposition.

Goods at the commencement of a bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business, by the consent of the true owner, under such circumstances that he is the reputed owner thereof, pass to the trustee in bankruptcy (see the Bankruptcy Act, 1883, s. 44) (*d*). It follows that where any trader, whether insolvent or not, executes a Bill of Sale of property employed in his business, and remains in possession of it till his bankruptcy, the trustee in bankruptcy can sell it as against the persons claiming under the Bill of Sale.

Mortgage of all a man's property (*e*).

A mortgage of all, or substantially all, a man's property to secure a past debt, unless in pursuance of an agreement made at the time of the advance, is a fraudulent conveyance (*Smith* v. *Cannan*, 2 El. & Bl. 35; *Re Wood*, L. R. 7 Ch. 302), and is therefore an act of bankruptcy and void, as being fraudulent within the Bankruptcy Act, 1883, s. 4 (1) (*b*), and the former Acts. But a mortgage of all a man's property for a substantial present advance, or for a past debt and substantial present advance made *bonâ fide* for his

(*d*) See M. L. P. P. 94, note (6); (*e*) See M. L. P. P. 319. *ib.* 323.

benefit, or for a past debt and future advances agreed upon and afterwards made in pursuance of the agreement, is not invalid.

Scheme for advance to small trader avoiding a Bill of Sale.

The following security was given by a small trader who wished to avoid the publicity given by registration of a Bill of Sale (see 2 K. & E. 166). The deed consisted of a covenant for payment of the total principal and interest in the course of a year by equal weekly instalments; a mortgage of the shop in which the business was carried on, of the goodwill of the business, and of all moneys received by or to become owing to the trader in respect of the business; a covenant by the trader to keep and produce to the mortgagee proper accounts; a proviso rendering the unpaid instalments immediately payable on the occurrence of either of the following events, viz., the death of the trader, breach of covenant by him, his giving a Bill of Sale, or giving a warrant of attorney to confess judgment, accepting an accommodation bill, allowing his goods to be taken in execution or under a distress, absenting himself from business, neglecting to carry on his business; or on the weekly takings falling below a named sum. The cashier of the business, who, in the case of a small trader, is generally his wife, was appointed receiver of all moneys becoming payable to him in course of trade; the receiver was directed to pay out of the weekly takings the weekly instalments, the rent of the shop, and the rates, taxes, &c. There were the usual provisions as to the appointment and removal of a receiver.

Under this security, if any weekly instalment is in default, or if any other event happens on the occurrence of which the whole debt is to become due, the mortgagee can foreclose or sell under his power; and, although the value of the lease and goodwill may be but small, still the pressure that a threat of sale would put on the trader would be so great that he would make an effort to procure the money.

## PART II.—CHOSES IN ACTION.

The phrase "chose in action" is used in contradistinction to "chose in possession." Its true meaning has been the subject of much controversy (*f*).

1st meaning of phrase.

In the more limited sense of the word (in which sense we shall employ it), by a chose in action is meant a right of action to enforce payment of a debt, or to obtain money by way of damages for breach of contract, or (though this is a moot point) as recompense for a wrong (*g*). For instance, if A. sells a horse to B., who does not pay him, A. has a right to recover payment of the price from B.; this right is a chose in action. See M. L. P. P. ch. ix. p. 122.

2nd meaning.

By a common confusion of language the money itself that can be recovered is also called the "chose in action." Where the money could formerly be recovered only by action at law, as in the common instance of a debt, it is called a *legal* chose in action; where it could formerly be recovered only by suit in Equity, as, for instance, where money is held upon a trust, it is called an *equitable* chose in action (*h*); where the money is not payable at the present time, but there is a present right to its future payment, as in the case of the money secured by a policy of assurance, which does not become payable till the death of the person whose life is insured, it is called a *reversionary* chose in action.

Legal.

Equitable.

Reversionary.

3rd meaning.

By a further confusion of language, lawyers sometimes speak of a document evidencing the title to a chose in action as itself being the chose in action. The reader will often hear a bond or a policy of assurance called a chose in action,

(*f*) M. L. P. P. 122; 9 L. Q. R. 311; 10 L. Q. R. 143.

(*g*) An assignment of a right to obtain damages for a wrong (Y. B. 34, H. 6, 30, pl. 15), or an assignment of a bare right to institute an action in Equity to set aside a conveyance for fraud (*Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481), is void on the ground of champerty. See this explained M. L. P. P. 135.

(*h*) See as to equitable debts, *Webb* v. *Stenton*, 11 Q. B. D. 518, at pp. 526, 530; M. L. P. P. 149.

but strictly speaking, the right to recover the money secured by the bond or policy is the chose in action.

Not assignable at law.

Assignable in Equity.

According to the doctrines of the Common Law, choses in action (with some exceptions) were incapable of being assigned; but Courts of Equity enforced such assignments, and therefore it is said that a chose in action is assignable in Equity, but not at law. (M. L. P. P. 125, *et seq.*; 1 W. & T. L. C., note to *Ryall* v. *Rowles*.) The application of this doctrine has, however, been greatly modified by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24; but we will first consider the law as it stood before that Act.

The student may find some difficulty in grasping the distinction between an assignment operating at law, *i.e.*, one that enables the assignee to sue at law in his own name, and one operating in Equity only, *i.e.*, one in which the remedy of the assignee for recovering the money is in Equity only. An example will render it more clear. If a cheque, originally drawn in favour of another person "or bearer," be delivered to A., he can bring an action at common law on the cheque in his own name, because the right to sue on a cheque is assignable at law. On the other hand, suppose that (before the Judicature Act) a creditor to whom a bond debt (which was assignable in Equity only) was due, assigned it to A., and the debtor refused to pay A.; A. could not bring an action in his own name to compel payment, for a Court of Common Law would refuse to recognise the assignment. He must either induce the original creditor to bring an action at law in his own name (which the creditor could do, notwithstanding the assignment, because it was not recognised by the Common Law), and to hand over the money to him when received; or take proceedings in his own name in a Court of Equity where the assignment was recognised, either against the creditor, to compel him to allow A. to bring an action in his name, or, in some cases, against the debtor himself.

Exceptions to rule.

But it may be objected that a debt is a chose in action; and is not the less a chose in action because it is secured

by a bill of exchange; yet such a debt is assigned by indorsing the bill, and the assignee can, and could before the Judicature Act, bring an action on the bill in his own name. This is one of the many exceptions to the old rule that a chose in action was assignable in Equity only. Unfortunately, no general rule can be laid down as to what choses in action are (independently of the Judicature Act) assignable at law. They consist chiefly of debts which, by the custom of merchants, are assignable by the indorsement or delivery of the document evidencing the right to them, such as Bills of Exchange and Cheques, and of debts, such as the Bonds and Debentures of Companies, which can by statute be transferred in some particular manner. The student will do well to bear these exceptions in mind, as many of the propositions laid down in the text-books with reference to choses in action require modification when applied to choses in action transferable at law. (See, as to these, M. L. P. P. 126.)

Policies of assurance.

By the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), the assignee of a policy who gives notice in writing of the assignment to the office pursuant to the Act, is enabled to sue at law for the policy moneys in his own name. No power of attorney is or was (*i*) necessary. (See 2 K. & E. 96.)

Form of assignment at Equity.

No special form of assignment is necessary in the assignment of choses in action assignable in Equity only (*Morrell* v. *Wootten*, 16 Beav. 197; *Rodick* v. *Gandell*, 1 De G. M. & G. 763; *Re Irving*, 7 Ch. D. 419), but the assignment was usually effected by a deed similar in its general form and arrangement to a conveyance of freeholds. Where a legal chose in action is assigned, it is important that the assignee should be able to sue the debtor at law, and therefore (in cases not within the Judicature Act, 1873), it was the practice to insert in the assignment of a legal chose in action a power

Form of assignment at law.

(*i*) The assignee cannot sue or give a discharge unless the assignment is duly stamped; Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 118.

Power of attorney.

(called a power of attorney) enabling the assignee "to demand, sue for, recover, receive, and give effectual discharges for the debt, in the name of the said [*assignor*]."

Judicature Act, 1873.

The Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25 (6), now provides (see M. L. P. P. 133) to the effect that an absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only) of any legal chose in action, of which express notice in writing shall have been given to the debtor, shall be effectual in law (subject to all prior equities) to transfer the legal right to such chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a discharge without the concurrence of the assignor.

The 24th section of the above Act provides to the effect that, if any plaintiff claims to be entitled to relief founded upon a legal right, which before the Act could only have been given by a Court of Equity, the High Court of Justice and the Court of Appeal shall give him the same relief as ought to have been given by the Court of Chancery in a suit for the same purpose properly instituted before the Act.

On the above provisions there has been a good deal of discussion in the profession as to how far it is still necessary to insert the power of attorney in assignments for value of legal choses in action.

The C. A. 1882, s. 8, provides that a power of attorney given for valuable consideration, in an instrument executed after 1882 and expressed to be irrevocable, shall not be revoked at any time either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, and that the acts done by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power or the death, &c., of the donor had not happened. As the assignee of an equitable chose in action can take proceedings in his own name to recover it, the power of attorney

should never be inserted where the chose in action is equitable only.

Costs of action.

It should be borne in mind that, if the power of attorney be acted upon, and an action be brought in the name of the original creditor, the latter, being the plaintiff on the record, may, on judgment going against him, be liable in costs. For this reason, if trustees (who ought never to incur any liability) make an assignment, with a power of attorney, a declaration is sometimes inserted that no action shall be brought in their names until sufficient security for costs has been given to them; or the assignee covenants to indemnify them against any costs that may be incurred.

A mortgage of a legal chose in action made in the form of a conveyance with a proviso for redemption is "an absolute assignment" within the meaning of the Judicature Act, 1873 (*j*). Although it appears clear that, where an "absolute" assignment, to which the debtor is a party, is made for value, or where notice is given to him immediately after the assignment, the power of attorney is unnecessary, yet it should be inserted in every assignment in which it would have been inserted if the Act had not been passed, except in these two cases.

Assignment of chose in action subject to all equities.

As the assignee of a chose in action takes it subject to all the equities affecting it (*Rolt* v. *White*, 31 Beav. 520; M. L. P. P. 129), or, in other words, takes only what the assignor could recover by action, it follows that the assignee ought before completion to inquire from the original debtor, whether he has notice of any assignment of, or charge on the chose in action, and what is the state of accounts as between himself and the assignor. If the debtor be informed of the object of the inquiry, he will, as between himself and the assignee, be bound by his answer (*k*).

Inquiries to be made before completion.

For example, suppose a simple contract debt is assigned by the creditor. Part of the debt may have been paid off;

(*j*) *Tancred* v. *Delagoa Bay Co.*, 23 Q. B. D. 239, though query as to the assignment of part of a mortgage debt; *Durham* v. *Robertson* (1898), 1 Q. B. 765.

(*k*) See, however, *Low* v. *Bouverie* (1891), 3 Ch. 82, that a trustee is not bound to answer.

but, if the creditor conceals this fact, the assignee may not, unless he makes inquiries from the debtor, discover the attempted fraud until he endeavours to enforce payment. He may also find on inquiry that the original creditor has previously assigned or mortgaged the debt, a fact which he would have no other means of discovering.

Notice to be given after completion.

If an assignment is made of a legal or equitable chose in action assignable in Equity only, the assignee must, immediately after the assignment has been executed, give notice of the assignment to the debtor, or the trustee of the fund, for the two following reasons: *first*, if no notice was given, the debtor might pay the original creditor, or the trustee might part with the fund; *second*, Courts of Equity have established the rule, that as between two assignees of a chose in action, he who first gives notice has priority. This rule has been expressed as follows, by Wood, V.C. (*Lee* v. *Howlett*, 2 K. & J. 535): "he who first makes himself master of a chose in action, by giving notice to prevent its being handed over by the person in whose hands it is to any other claimant—in other words, who first divests the title of the owner by giving notice to the person through whom the owner must derive the fund—arrests that fund and acquires the property for himself. Whether the fund be a trust fund held by A. in trust for B., or a debt payable by A. to B., if B. assigns, and his assign requires A. to pay the money over to him, that gives him priority over a previous assign of B., who has not given such notice" (*l*).

An example will render this more clear. We will suppose that on his marriage A. proposes to settle a reversionary interest expectant on his mother's death in the trust funds comprised in her settlement. Inquiry should, strictly speaking, be made before the marriage from the trustees of the mother's settlement, whether they have had notice of any assignment of or charge on A.'s

(*l*) See *Re Wyatt, White* v. *Ellis* (1892), 1 Ch. 188; S.C. sub nom. *Ward* v. *Duncombe* (1893), A. C. 369; *Re Wasdale* (1899), 1 Ch. 163.

interest, and also what is the amount of his reversionary interest, though to the author's belief the former inquiry is often omitted in this particular case. Immediately after the execution of A.'s settlement notice of it must be given to the trustees of the mother's settlement.

Let us take another example: A. B. proposes to mortgage a policy on his own life to C. D. Here the debtor is the Insurance Office, and the inquiry must be made from it immediately before the money is advanced, and notice given to it on completion.

It appears from the large number of cases that come into Court, that sufficient attention is not paid to giving notice, and that considerable losses are incurred in consequence. Sometimes the assignor requests the assignee not to give notice to the debtor, on the ground that the assignor might be injured if it became known that he had parted with, or incumbered, his property. But, if such a request is acceded to, the assignee must rely entirely on the honour of the assignor not to make another assignment behind his back; and if such an assignment be made, the subsequent assignee may, by giving due notice, obtain priority over the earlier one. There is, in some cases, another reason for giving notice of the assignment. It will be observed that, till the assignee has completed his title by notice to the debtor, the debt is within "the order and disposition" of the assignor; and before the Bankruptcy Act, 1869, would therefore have passed to his assignees in bankruptcy. The rule is now only applicable to debts due or growing due to a bankrupt in the course of his trade or business. See the Bankruptcy Act, 1883, s. 44 (iii.), and M. L. P. P. 322.

Order and disposition.

It should be noted that recent decisions have shown that there is often considerable risk in taking an assignment of a chose in action; for it has been held that a trustee is not bound to answer inquiries as to incumbrances (*m*);

(*m*) *Low* v. *Bouverie* (1891), 3 Ch. 82.

and that to inquire of a trustee and then proceed where he does not answer the inquiry, is equivalent to proceeding without any inquiry (*n*).

Stop order.

In cases where the chose in action is a fund in Court, there is no person to whom notice can be given (*o*). It is, therefore, necessary to obtain a stop order, which can be made on summons: and the assignment should contain a power to use the name of the assignor as a consenting party to the summons (2 K. & E. 114). The title of the assignor must either appear from the proceedings by virtue of which the fund is in Court, or be proved by affidavit. The order made is that the funds "shall not be transferred, sold, paid out, or otherwise disposed of" without notice to the assignee. It appears (*Macleod* v. *Buchanan*, 33 Beav. 234, 4 De G. J. & S. 265) that an incumbrancer who has obtained a stop order on a particular fund cannot safely make a further advance without obtaining a fresh stop order.

Exception to rule as to notice.

There is, however, one important exception to the rule of Equity, that as between several assignees of a chose in action, he who first gives notice obtains priority, and that is the case of a mortgage debt charged on land. Here the mortgagee has an interest either legal or equitable in the land, and although the assignee of such a mortgage debt ought (*post*, p. 210) to give notice to the mortgagor, no priority is gained by notice (*p*). On the other hand, where the subject matter of the assignment is a share of the proceeds of real estate directed to be sold, or of money directed to be raised by the sale or mortgage of land, priority is obtained by notice (*q*).

Assignment of bond debt.

Here follows an analysis of an absolute assignment of a bond debt.

(*n*) *Re Wyatt* (1892), 1 Ch. 188; S.C. *Ward* v. *Duncombe* (1893), A. C. 369.

(*o*) *Pinnock* v. *Bailey*, 23 Ch. D. 497; *Mutual Life Assurance Society* v. *Langley*, 26 Ch. D. 686; 32 Ch. D. 460. See 2 K. & E. 114, note; M. L. P. P. 129.

(*p*) *Re Richards*, 45 Ch. D. 589; *Wiltshire* v. *Rabbits*, 14 Sim. 76.

(*q*) *Lee* v. *Howlett*, 2 K. & J. 531; *Re Hughes' Trust*, 2 H. & M. 89; *Arden* v. *Arden*, 29 Ch. D. 702.

1. The date.
2. The parties.
3. The recitals (*a*) of the bond.
   (*b*) of the state of the bond debt.
   (*c*) of the agreement for sale.
4. The consideration and receipt.
5. The assignment "by the said [*assignor*] as beneficial owner" to the said [*assignee*] of "all that the hereinbefore recited bond, and the principal sum of £—— and all interest [now due and] henceforth to become due for the same."
6. [The power of attorney.]
7. The habendum.

Mortgage of chose in action.

When an assignment of a chose in action is made by way of mortgage only, it must be remembered that possibly the original debt may be paid off before the mortgage debt. To provide against this contingency, clauses were formerly inserted authorising the mortgagee to give receipts for the whole debt (for otherwise the original debtor would have to pay part to the mortgagee, and part to the mortgagor, and might have at his own risk to ascertain the state of accounts between them), and declaring that the moneys, when received by the mortgagee, should be held by him upon trust, after retaining his costs and all moneys due on the security, for the mortgagor; the two clauses being similar to clauses 5 and 6 in a power of sale in a mortgage of freeholds (*ante*, p. 166). In mortgages since 1881 the clauses may safely be omitted in reliance on the C. A. 1881, s. 22. But the mortgagee cannot enforce payment to himself of a larger sum than is due to him on his security (*r*).

It must be also remembered that the mortgagee would be bound, in the absence of a stipulation to the contrary, to do everything in his power for the purpose of obtaining payment of the chose in action mortgaged. He may, generally speaking, be trusted for his own sake to do so;

(*r*) See *Hockey* v. *Western* (1898), 1 Ch. 350.

for, if he does not, he may lose his mortgage debt. The mortgagee's indemnity clause protects him against the consequences of an accidental omission in this respect.

Mortgage of life policy (*s*).

Where money is to be advanced on the security of a policy of life assurance, an existing policy may be assigned to the mortgagee; or a new policy may be effected in the name of the mortgagor, and assigned to the mortgagee; or it may be effected in the name of the mortgagee (see forms, 2 K. & E. 96); in which latter case the mortgage deed necessarily contains no assignment, and as it creates a charge, it is a "mortgage" within the C. A. 1881 (see s. 2 (v.)), so that the statutory power of sale is conferred by it. In either case the deed contains the proviso for redemption and other usual clauses of a mortgage deed, and provisions for the purpose of keeping up the value of the policy. For the latter purpose a series of clauses are inserted in the group V. (*ante*, p. 15) to the following effect:

Covenants by the mortgagor.

- (*a*) Not to do anything by which the policy may become void (as, for instance, by going to the tropics contrary to the terms of the policy).
- (*β*) To restore it if it becomes voidable.
- (*γ*) To effect a new policy in the name of the mortgagee if the original policy becomes void.
- (*δ*) That the new policy shall be subject to the present security.
- (*ε*) To pay the premiums on any new or substituted policy and deliver the receipts to the mortgagee; with power to the mortgagee to pay the premiums on default by the mortgagor in paying them.
- (*ζ*) To repay on demand the moneys so paid by the mortgagee and his expenses with interest, such moneys until repayment to be a charge on the mortgaged premises (*t*).

(*s*) See as to policies on life, M. L. P. P. 137.

(*t*) See *Re Leslie*, 23 Ch. D. 552.

Case of creditor insuring debtor's life without any bargain.

Occasionally a creditor insures his debtor's life without any bargain on the subject; and in this case the question may arise whether the policy belongs to the creditor absolutely or is redeemable by the debtor. The general rule is that, in the absence of contract express or implied, a policy effected on the life of another will belong to the person who effects it. But this presumption is rebutted if the debtor pays the premiums, or is with his assent (*Bruce* v. *Garden*, L. R. 8 Eq. 430, 5 Ch. 32) charged with them in account; in either of which cases the policy becomes the property of the debtor on payment of the debt (*u*).

A newly effected policy of assurance is not in itself of much value as a security, but it is of considerable value when it is combined with the mortgage of something else, such as a life interest, which will afford a fund out of which the interest and premiums may be paid.

Mortgages of life interests.

Mortgages of life interests in realty (*ante*, p. 180) or personalty are often combined with mortgages of policies. In mortgages of life interests in personalty power should be given to the mortgagee to require the trustees of the mortgaged fund to pay the income to him (see form, 2 K. & E. 102). It is usual to insert a declaration that he shall apply it in payment of all costs incurred "in the execution of the trusts or powers of these presents," which would authorise him to pay the premiums on the policies; and, in the next place, in payment of the moneys for the time being due on the security; and that he shall pay the surplus to the mortgagor; but the declaration may be omitted in reliance on the C. A. 1881, s. 22.

Mortgage of choses in action assignable at law.

As already pointed out, there are some exceptional cases in which choses in action can be transferred at law. No remarks appear to be necessary in this place with respect to absolute assignments of them; but mortgages of them and of certain other interests in personal property, which are not strictly choses in action, will present some difficulties

(*u*) See *Marquis of Northampton* v. *Pollock*, 45 Ch. D. 190; S.C. sub nom. *Salt* v. *Marquis of Northampton* (1892), A. C. 1.

to the student. Although the methods next pointed out are those adopted where formal mortgages are given, they are rarely used. More commonly some scheme is adopted, under the advice of a stockbroker, which may or may not be effectual.

Transfers in blank (*x*).

A scheme which is often used by stockbrokers, but which is generally ineffectual, is a "transfer in blank." In such a case the mortgagor executes transfers of the shares leaving a blank for the name of the transferee, the intention being that the mortgagee may, if occasion require, fill up the blank either with his own name or with the name of a purchaser. It need hardly be said that, in cases where a deed is necessary to transfer the shares, this scheme entirely fails of effect; for a conveyance to an unnamed person is entirely inoperative. The person who has executed such a conveyance of shares remains the legal owner of the shares, and the holders of the transfers acquire no right at law, though they may acquire an equitable right to have the shares transferred to them (*y*).

Where liability is not incurred.

If the property be of such a nature that its ownership does not involve any liability in respect of it (as for example if it be a railway debenture), the mortgage is effected by a transfer in the appropriate manner to the mortgagee; and a deed containing the proviso for redemption, and, if necessary, the trusts of the moneys to be received in respect of the mortgaged property (unless the latter clause is omitted in reliance on the C. A. 1881, s. 22). It should be observed that, as the deed creates a charge, it is a mortgage within the meaning of the C. A. 1881, so that a power of sale is implied.

Where liability is incurred.

On the other hand, if the ownership of the property involves liability, a different course is adopted. In this case the mortgagee is not made the legal owner, and consequently he incurs no liability as owner; but provisions have

(*x*) See note, 2 K. & E. 173.

(*y*) Interp. 28; *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20; *Powell* v. *London & Provincial Bank* (1893), 1 Ch. 610; 2 Ch. 555.

to be made for the purpose of enabling him either to become the legal owner without any further act on the part of the mortgagor, or to make a transfer at law without himself first becoming the legal owner, to any person to whom he may sell under the power of sale.

The first object is carried into effect in different manners, according to the subject-matter of the security. If it be of such a nature that the mere execution of the deed of transfer by the mortgagor does not cause the transferee to become the owner or to incur any liability, until some additional act is performed by him, a formal deed of transfer is executed by the mortgagor; but the additional act is not performed. For example, where shares in a company are to be mortgaged, a transfer of the shares is executed by the mortgagor but not by the mortgagee, and the name of the mortgagee is not entered on the register of the shareholders; so that, although he does not become the legal owner of the shares, he can, if he think fit, complete his title by executing the transfer and registering himself at any moment (*z*). Notice of the transfer should be given to the company so as to preserve priority as against any subsequent assignment by the mortgagor (*a*), and the share certificates should be delivered to the mortgagee (*b*). The mortgage deed will, in addition to the usual clauses, contain a declaration of trust by the mortgagor in favour of the mortgagee, with power to the mortgagee to appoint a new trustee at any time; and a power of attorney authorising the mortgagee on any sale of the shares to execute transfers of them to the purchaser in the name of the mortgagor, by which means the mortgagee can make a transfer direct to the purchaser without becoming the legal owner, and therefore without incurring any liability as owner. The mortgagor, remaining the registered owner, can receive the dividends; but power should be given to the mortgagee to receive them, if he should think fit.

(*z*) See *Moore* v. *North-Western Bank* (1891), 2 Ch. 599.

(*a*) *Re Shelley*, 4 De G. J. & S. 543.

(*b*) See *Société Générale* v. *Walker*, 11 App. Cas. 20.

In cases where the transfer does not require any additional act, such as registration, for the completion of the title of the transferee, no transfer is executed by the mortgagor, but a power of attorney is inserted in the mortgage deed enabling the mortgagee to execute a transfer to himself in the name of the mortgagor.

In either of these cases it is desirable to insert the usual power of giving receipts for and the declaration of trust of moneys received in respect of the mortgaged property, and an express power of sale, as there may be some doubt whether the deed is a "mortgage" within the C. A. 1881, so as to imply these provisions. (See 2 K. & E. p. 175.)

The student may have some difficulty in seeing how the mortgagee can enforce his security. The mortgagee may do this in either of the two following ways, viz.: (1) he may complete his title, either by registration or by executing a transfer to himself in the name of the mortgagor, as the case may be, a process somewhat analogous in its effects to an ejectment by a mortgagee of freeholds. In this case he will, by completing his legal title, render himself liable for calls, &c., and will be mortgagee in possession, and liable to account to the mortgagor as such. Or (2) he may, without completing his own title, sell under the power of sale. In this case he can call upon the mortgagor, as his trustee, to execute a transfer to the purchaser; or, if he thinks fit, he can execute a transfer to the purchaser in the name of the mortgagor by virtue of the power of attorney.

Married woman (*c*).

Reduction into possession.

If a married woman be entitled to a chose in action (not forming part of her separate estate, either by express declaration or by virtue of the M. W. P. A. 1870, or the M. W. P. A. 1882), and her husband "reduces it into possession," in other words, obtains payment of the debt during the coverture, he can give a receipt for it, which is binding as against the wife; and apparently, if the debt is immediately payable, he can give a release for it which is binding on the wife (*Miles* v. *Williams*, 1 P. Wms. 249);

(*c*) See, as to a married woman's choses in action, M. L. P. P. 385.

but an assignment by him is ineffectual as against the wife surviving him (even if she joins in the assignment; *Prole* v. *Soady*, L. R. 3 Ch. 220), unless the assignee obtains payment of the debt during the coverture, which is equivalent to a reduction into possession by the husband. If the chose in action is not reduced into possession during the coverture, it remains the wife's property if she survives her husband, and passes to him as her administrator if she dies in his lifetime, subject to her debts and to the rights of any person claiming as assignee of the husband. (See *post*, 302.)

The question as to what amounts to a reduction into possession by the husband is sometimes one of considerable difficulty; the reader is referred to M. L. P. P. 386, and the note in 2 Dav. Prec. Part I. 223.

Wife's mortgage debt.

Where the chose in action is a mortgage debt due to the wife, the mortgagor may, of course, pay off the debt if he thinks fit to do so. Unless the debt is the wife's separate property (either by express declaration or by virtue of the M. W. P. A. 1870, or the M. W. P. A. 1882), in which case she can give a receipt for it, the payment must be made to the husband, whose receipt will discharge the mortgagor; and the transaction will operate as a reduction into possession by the husband.

The case of *Rees* v. *Keith*, 11 Sim. 388, shows that, where a mortgage debt belonging to the wife, and not being part of her separate estate (either by express declaration or by virtue of the M. W. P. A. 1870, or the M. W. P. A. 1882), is paid to the husband by a third person on behalf of the mortgagor, the husband's receipt discharges the mortgagor, and the wife becomes a trustee of any interest that she has in the subject of the mortgage. It appears to follow that, where a third person pays off the debt, a transfer to him of the mortgage debt and securities, which would bind the wife surviving, could be effected by the husband making an assignment of the mortgage debt by the direction and at the request of the mortgagor, and by the husband or the husband and wife, where her

concurrence is necessary, making a transfer of the mortgaged property.

The reader may ask how the transferee could obtain a good title to the mortgaged property if it be a chose in action assignable in Equity only, and the wife survives her husband, who dies before it has been reduced into possession. The answer is that, as the wife becomes, after the payment to her husband, a mere trustee, she would be obliged, after the husband's death, to assign the mortgaged property to the transferee.

It must in all cases be borne in mind that, where the mortgage debt is secured on land, and the wife is willing to concur in the transfer, no difficulty will arise, for the debt is an interest in land which the wife can pass by an assurance perfected according to the provisions of the Fines and Recoveries Act, 1833. (*Williams* v. *Cooke*, 4 Giff. 343; *Miller* v. *Collins* (1896), 1 Ch. 573.)

If the mortgage debt is secured on leaseholds, the husband can, if the wife was married and her title accrued before 1883, convey the leaseholds without his wife's concurrence; and if the transfer is made at the request of the mortgagor, no difficulty will arise. But, if the wife concurs, she should acknowledge the deed, so as to bring the case within the principles laid down in *Williams* v. *Cooke*.

Reversionary interests of wife.

If the wife's chose in action is reversionary, and consists of pure personalty, but does not form part of her separate estate (either by express declaration or by the M. W. P. A. 1870, or the M. W. P. A. 1882; *Lechmere* v. *Brotheridge*, 32 Beav. at p. 369), there was formerly no method by which it could be dealt with so as to bind the wife surviving, because from the nature of the case it could not be reduced into possession (see M. L. P. P. 387). Attempts were made to get over this difficulty by inducing the persons having the prior interests to assign them to the wife, so that they could coalesce with her reversionary interest and render it a present interest that could be reduced into possession; but Courts of Equity decided that in such a case the wife's

interest remains reversionary for the purpose of affording her protection (*d*). The effect of the Married Women's Reversionary Interests Act, 1857 (20 & 21 Vict. c. 57, commonly called Malins' Act), is to enable a married woman to dispose by deed acknowledged of reversionary interests of this nature (*e*), to which she becomes entitled under any instrument *made* (*f*) since 1857 (other than her own marriage settlement), unless such instrument contains a restraint on alienation.

The wife's reversionary interest in money charged on land, or in the proceeds of real estate directed to be sold, can, and could even before the Act, be passed by deed acknowledged (see the cases referred to in 2 Dav. Prec. Part I. 223 *et seq.*).

Chose in action being wife's separate estate.

Where a wife is entitled to a chose in action (whether in possession or reversion, and consisting of either pure personalty, or money charged on land, or of the proceeds of land directed to be sold) which forms part of her separate estate (either by express declaration or by virtue of the M. W. P. A. 1870, or the M. W. P. A. 1882), she can dispose of it without the concurrence of her husband.

See further as to the rights of husbands over the property of their wives, *post*, Chapter XI.; and M. L. P. P. ch. xxi. p. 384.

(*d*) See *Whittle* v. *Henning*, 2 Ph. 731.

(*e*) The words "future interests" in the act refer to interests to which the married woman has some existing title at Law or in Equity; per Stirling, J., *Allcard* v. *Walker* (1896), 2 Ch. 369, at p. 380.

(*f*) Where a will is made before 1858 the case is not within the Act though the testator die after 1857. See *Re Elcom* (1894), 1 Ch 303.

# CHAPTER VIII.

## MISCELLANEOUS DEEDS RELATING TO MORTGAGES.

### PART I.—TRANSFERS OF MORTGAGES.

When made use of.

A TRANSFER of a mortgage is made use of in either of the following cases:—

*First.* The mortgagee may call in his money, and the mortgagor may be unable to pay him off. In this case the latter is forced to borrow it from some one else, and a transfer of the existing mortgage and securities is generally taken by the person lending the money, as he thereby gets the same priority for his charge as the original mortgagee had; whereas if a fresh mortgage to the lender were made, other incumbrances might be let in to his prejudice.

*Second.* When a mortgage is vested in trustees and new trustees are appointed.

Effect of transfer of debt and of land.

The question whether the assignment of the mortgage debt to a transferee enables him to sue for it in his own name has been already discussed (*ante*, p. 188). In cases where it is desired to enable the transferee to sue for the original mortgage debt, and there is any doubt of the possibility of immediately giving notice to the mortgagor, a power of attorney is given by the original mortgagee to the transferee authorising him to sue in the name of the original mortgagee. The land can be transferred to the transferee at law; and, if the original mortgage be properly framed, he becomes, as the assignee of the mortgage debt, entitled to enforce in his own name all the remedies against the land that the mortgagee could have enforced during the continuance of his security. See as to mortgages made

since 1881, the definition of "mortgagee" in the C. A. 1881, s. 2 (vi.).

The mortgagor, or any subsequent incumbrancer who pays off the mortgage, can require a mortgagee, who has not been in possession, to assign the mortgage debt and convey the mortgaged property to any third person (*a*).

For many years before 1882 it was the usual practice for a mortgagee who was paid off, to assign the mortgage debt, if requested so to do by the mortgagor, to any one advancing the money for the purpose of paying him off; but he could not be compelled to do so, however ruinous the consequences of his refusal might be to the mortgagor (*b*).

Variations as the mortgagee is or is not a party.

There are three cases which vary the form of the transfer.

1st. Where the mortgagor is not a party to the transfer (*c*).

2nd. Where he is a party to the transfer, and has incumbered the equity of redemption (*d*).

3rd. Where he is a party, and has not incumbered the equity of redemption (*e*).

It will be convenient to point out the difference between the operative parts in these three cases before we consider the difference between the recitals.

Assignment of mortgage debt.

In each case the mortgagee assigns the mortgage debt and the interest thenceforth to become due thereon and the benefit of all securities for the same to the transferee; but the object of doing so is different in the several cases. In the *first* case, where the mortgagor is not a party, the object of assigning the debt is to enable the transferee to sue on the covenant for payment contained in the mortgage; for which purpose it was formerly necessary to insert a power of attorney enabling the transferee, his executors, administrators, or assigns, to sue and give receipts for the principal

Power of attorney when required.

(*a*) C. A. 1881, s. 15, as amended by the C. A. 1882, s. 12.

(*b*) *Dunstan* v. *Patterson*, 2 Ph. 345; *James* v. *Biou*, 3 Swanst. 241; *Smith* v. *Green*, 1 Coll. 563; *Colyer* v. *Colyer*, 3 De G. J. & S. 693; *ante*, p. 149.

(*c*) See form, 2 K. & E. 207; Stud. Prec. 63, 71.

(*d*) See form, 2 K. & E. 215; Stud. Prec. 68.

(*e*) See form, 2 K. & E. 212; Stud. Prec. 65.

and interest in the name of the original mortgagee, his executors or administrators; but, since the Judicature Act, 1873, came into operation, the power of attorney need be inserted only in cases where it is anticipated that there will be some difficulty in immediately giving notice of the assignment to the mortgagor (*ante*, p. 191). In the *second* and *third* cases, where the mortgagor is a party, the only object of the assignment of the debt is to show that it is intended to be kept alive for the protection of the transferee; but a fresh covenant by the mortgagor for payment is given to the transferee, and therefore the power of attorney is omitted.

When not required.

The express power of sale (if any) and other powers and remedies against the land should not be expressly assigned in either case; for, if they were properly framed in the original mortgage deed, they will pass to the transferee as the assign of the original mortgagee; but nothing that the mortgagee can do will give the transferee the right to exercise them if they do not pass to him by virtue of the original mortgage deed; see *Re Rumney and Smith* (1897), 2 Ch. 351. The powers of sale, &c., given to mortgagees by the C. A. 1881, will be exercisable by the transferee; for "mortgagee" is defined in the Act so as to include every person deriving title under the original mortgagee; see s. 2 (vi.). Where the mortgagor is a party to the transfer, it appears proper to recognise the existence of any express powers so as to exclude any doubt as to the intention to keep them alive (*f*). This is done, not by assigning them, but by adding to the assignment of the debt the words, "with the benefit of the power of sale and of all other powers, remedies, and securities contained in or given by the said indenture of mortgage for securing or recovering the said principal sum and interest." See 2 K. & E. 213; Stud. Prec. 66, 70.

Power of sale.

Next follows in each case a conveyance of the mortgaged property by the mortgagee to the transferee. If the mortgagor is a party, the conveyance is expressed to be made at his request: and, if he has not incumbered the equity of

Conveyance of mortgaged property.

(*f*) *Young* v. *Roberts*, 15 Beav. 558.

redemption, he joins as a conveying party. The parcels are generally set out in the recital of the original mortgage, and in the conveyance they are usually described as "the hereditaments and premises by the hereinbefore recited indenture granted, or which now by any means are vested in the said [*mortgagee*] subject to redemption by virtue of the same indenture." It is sometimes more convenient, particularly when the mortgagor is a party and has not incumbered the equity of redemption, to describe the parcels fully in the operative part, referring to them shortly only in the recitals. If the mortgage be dated so long ago that the description of the mortgaged property has changed, it is sometimes desirable, where the mortgagor is a party, and has not incumbered the equity of redemption, to convey it by the new description; but it must be remembered that the mortgagee is not bound to do so unless words are introduced qualifying the new description, so as to show that nothing is intended to pass except the property actually vested in the mortgagee.

Subject to old equity of redemption.

Where the mortgagor is not a party to the transfer, the mortgagee cannot alter the equities affecting the land; and even where he is a party and has incumbered the equity of redemption, he and the mortgagee cannot alter the equities affecting the land as against subsequent incumbrancers; and therefore the habendum in either of these cases must be made "subject to such right or equity of redemption as the same premises are now subject to by virtue of" the original mortgage deed; see 2 K. & E. 210; Stud. Prec. 71; but, for the purpose of showing that the debt is now charged on the land in favour of the transferee, the form continues, "on payment to the said [*transferee*], his executors, administrators, or assigns" of the mortgage debt and interest. Where the mortgagor is a party to the transfer, and has not incumbered the equity of redemption, the case is different; for he and the mortgagee, having together the entire legal and equitable interest in the land, can affect it with any equities that they think fit; and

Free from old but subject to new equity of redemption.

accordingly, in this case, where, it will be remembered, the mortgagee conveys at the request of the mortgagor and the mortgagor conveys and confirms, the habendum is usually made free from the existing equity of redemption, but subject to a new proviso for redemption on payment to the transferee. See 2 K. & E. 214; Stud. Prec. 67.

Covenants by mortgagee.

Whether the mortgagor is a party or not, the mortgagee assigns the debt and conveys the mortgaged property "as mortgagee" so as to imply a covenant against incumbrances. See the C. A. 1881, s. 7 (1), F.

By mortgagor.

If the mortgagor be a party, he covenants for payment of principal and interest so that the transferee may have his own covenants to sue upon. If the equity of redemption has been incumbered, covenants for title by the mortgagor or a new power of sale would be useless; but, where it has not been incumbered, covenants for title are implied by the mortgagor conveying "as beneficial owner"; and formerly a fresh power of sale, and other powers and remedies were usually inserted for the benefit of the transferee; but now the statutory powers are relied upon.

If the mortgagor is a party, the clause protecting the mortgagee against involuntary losses is added, *ante*, p. 173.

Recitals.

To return to the consideration of the recitals. The mortgage is recited, stating the covenants for payment of principal and interest (*g*), the conveyance and the proviso for redemption, and noticing the provisions if any of the IVth group (*ante*, p. 151); and, if the mortgagor be a party, the express power of sale, if any. Then follows a recital that the principal is still due, and either that interest is due from a certain day, or that no interest is due. And there is a recital, according to the circumstances, either that the transferee has agreed to pay off the mortgage debt to the original mortgagee, "upon having such transfer as is hereinafter contained," of the mortgage debt, and interest, and securities; or that he has agreed to do so at the mortgagor's

(*g*) If the original mortgagor is a party and gives fresh covenants for payment, it is unnecessary to recite the covenants.

request, "upon having such transfer, &c., and upon having repayment of the same with interest after the rate hereinafter mentioned, further secured in manner hereinafter appearing."

Transfer to new trustees.

Where the mortgage is vested in trustees, and the fact of their being trustees does not appear on the title, and the mortgage has to be transferred upon an appointment of new trustees, care must be taken to frame the transfer so as not to disclose the trusts; for if they be disclosed, the instrument by which the trusts are declared will become a title deed to the mortgaged property. The proper course appears to be to recite that the mortgage debt now belongs in Equity to the continuing and new trustees, and that the continuing trustees have agreed, at the request of the new trustees, to make a transfer of the mortgage debt and securities (*h*). The rest of the transfer will follow the same form as if both the continuing and new trustees were beneficially entitled to the mortgage debt.

Transfer by a deed indorsed.

Where both mortgagee and transferee are clients of the same solicitor, it is generally desirable to make the transfer by a deed indorsed on the original mortgage deed (see form in Stud. Prec. 65); but when they are not, this cannot be done, as it is the duty of the transferee's solicitor to engross the transfer; while the mortgagee may and probably will refuse to allow his mortgage deed to pass out of his hands for that purpose. In this case brevity may be obtained by making the transfer supplemental to the mortgage or previous transfer. See C. A., 1881, s. 53, and forms in 3rd Schedule to the Act.

Mortgagor should be a party if possible.

It is hardly necessary to observe that, in all cases in which it is possible, the mortgagor should be made a party for the purpose of being bound by the recital as to the state of the debt; and, if he is not a party, inquiry should if possible be made from him before completion as to the state of accounts between him and the mortgagee (*i*); and notice

(*h*) *Re Harman & Uxbridge, &c. Ry. Co.*, 24 Ch. D. 720; see *Re Blaiberg and Abrahams*, (1899) 2 Ch. 340, and form in 2 K. & E. 223.

(*i*) *Bradwell* v. *Catchpole*, 3 Swanst. 78, note; *Chambers* v. *Goldwin*, 9 Ves., see p. 264.

Notice to mortgagor.

of the transfer should be given to him; for, if he were not a party, and had no notice of the transfer, he might set off against the claim of the transferee not only all moneys paid by him towards the discharge of the mortgage debt before the assignment, but also moneys so paid after the assignment but before notice of it; but notice to the mortgagor is not necessary to the validity of the transfer (*k*).

Statutory transfer.

A statutory mortgage (see *ante*, p. 174) can be transferred by a statutory transfer (see the C. A. 1881, s. 27) made in one of the forms given in Part II. of the 3rd Schedule to the C. A. 1881. The effect of the statutory transfer, made in either form, is to vest the mortgage debt and securities and the powers of the mortgagee in the transferee, and to vest the estate of the mortgagee in the mortgaged land in the transferee, subject to redemption. The three forms given in the schedule are adapted respectively to the cases of (1) a transfer without the concurrence of the mortgagor; (2) where he concurs for the purpose of covenanting only; and (3) where he joins in the conveyance.

Simultaneous transfers of mortgages on property of different mortgagors.

Occasionally the same mortgagee holds mortgages on the property of different mortgagors, and wishes to transfer them all to the same person. This is a case which often happens when the mortgagees are trustees and a new trustee is appointed. Care must be taken in this case to transfer each mortgage by a separate deed; for if this is not done, inconvenience will be occasioned to the mortgagors when the mortgages are paid off, as the same deed—the deed of transfer—will be a title deed of each of them. And it appears that the mortgagor who is the first to redeem has a right to the custody of the deed of transfer, on executing, at the expense of the transferee (whose bad conveyancing has caused the inconvenience), an acknowledgment of his right to production and delivery of copies and an undertaking for safe custody (*l*).

(*k*) *Jones* v. *Gibbons*, 9 Ves. 411.

(*l*) *Capper* v. *Terrington*, 1 Coll. 103; *Dobson* v. *Land*, 4 De G. & Sm. 575.

Transfers of mortgages of copyholds (*m*).

The method of making the transfer of a mortgage of copyholds depends upon the manner in which the mortgage has been effected.

The mortgage may (see *ante*, p. 175) have been made—

($\alpha$) By covenant to surrender (see form in Stud. Prec. 56).

($\beta$) By conditional surrender (see form, in Stud. Prec. 59).

($\gamma$) By conditional surrender followed by admittance.

In each case we shall only point out the peculiarities in the conveyance of the land, the forms of the assignment of the debt being the same as in the case of a transfer of mortgage of freeholds.

No surrender made.

In the *first* case, where no conditional surrender has been made, the mortgagee has an equitable interest in the copyhold, which he can pass by assignment (*Rex* v. *Hendon*, 2 T. R. 484); and accordingly all that is necessary, in the absence of the mortgagor, is an assignment by the mortgagee, "as mortgagee," of the copyhold and of the benefit of the covenant to surrender, with power to sue in the name of the covenantee; habendum to the transferee, his heirs and assigns, subject to the existing equity of redemption on payment to the transferee. If the conditional surrender is ever made, it will be made to the transferee by the mortgagor.

Surrender but no admission.

In the *second* case, where the mortgage was effected by means of a conditional surrender, if the mortgagor concurs, and there is no subsequent surrender on the Court Rolls, the best course is to make a fresh conditional surrender by the mortgagor to the use of the transferee, and to enter up satisfaction of the old conditional surrender on the Court Rolls (see form in Stud. Prec. 76). If the mortgagor does not concur, or if he has made subsequent surrenders, the proper method is for the mortgagee to be admitted, and to surrender to the use of the transferee subject to the existing equity of redemption. The deed will therefore contain a covenant on the part of the mortgagee to surrender to the use and at the costs of the transferee, subject to the existing

(*m*) See 37 Sol. J. 727.

equity of redemption, followed by a declaration that in the meantime the mortgagee will be a trustee for the transferee. (See form in 2 K. & E. 211, 216; Stud. Prec. 71.) The objection to this plan is that it entails additional fines and fees on the admittance and surrender of the mortgagee, on the admittance of the transferee, and on the surrender to the mortgagor when the mortgage is paid off, and on his admittance. For the sake of avoiding this expense, the transferee sometimes remains satisfied with a covenant from the mortgagee to surrender if required.

Mortgagee admitted.

In the *third* case, where the mortgagee has been admitted, he will surrender to the use of the transferee subject to the existing equity of redemption (see form, 2 K. & E. 218).

Transfer of mortgage of personalty.

A transfer of a mortgage of leaseholds or personalty follows the same general form as the transfer of a mortgage of freeholds: the principal differences being (1) that the assignment of the property and the habendum are to the transferee, "his *executors, administrators,* and assigns," (these words may be omitted); and (2) that there is no declaration of uses. If the mortgage is effected by demise, and contains a declaration of trust of the nominal reversion for the mortgagee, this should be assigned. See form in Stud. Prec. 65, and 2 K. & E. 211.

Form of transfer when mortgagee is dead.

Where the mortgagee is dead, the form of the transfer depends upon the date of his death as well as on the nature of the property.

*As to the mortgage debt.*—At whatever time the mortgagee died, his legal personal representatives, or, if he made a bequest of the mortgage debt to which they assent, the legatee of the debt can assign the debt. In this latter case the legal personal representatives should, if possible, concur so as to render it unnecessary to keep evidence of their assent.

Personalty —leaseholds.

*As to mortgaged personalty, including leaseholds.*—Whenever the mortgagee died, a transfer of the mortgaged personalty can be made by his legal personal representatives, or by the legatees of his mortgage estates after the legacy has been assented to.

Freeholds.

*As to the legal estate in freeholds.*—If the mortgagee died before 1882 the transfer is made by his heir or the devisee of his mortgage estates, as the V. & P. A. 1874, s. 4, did not apply to a transfer of a mortgage (*Re Spradbery's Mortgage*, 14 Ch. D. 514); if he died after 1881, it is made by his legal personal representatives; for, by the C. A. 1881, s. 30, any "estate of inheritance, or limited to the heir as special occupant in any tenements or hereditaments, corporeal or incorporeal," vested in a sole mortgagee devolves on his death, notwithstanding any testamentary disposition, on his personal representatives or representative from time to time as if it were a chattel real. In this case, if the mortgagee makes a specific bequest of the mortgage debt and a devise of the mortgaged land to the same person, his legal personal representatives can assent so as to vest the legal estate in that person, who would then be able to make a valid transfer; but it would be proper to obtain the concurrence of the legal personal representatives for the reasons mentioned above.

Copyholds. Where there is a conditional surrender.

*As to the legal estate in copyholds.*—(A) If the mortgagee is dead at the time of the transfer, and a conditional surrender has been made by the mortgagor, the manner of dealing with the legal estate depends upon whether the mortgagee was admitted or not.

(1) If he has not been admitted, and the mortgagor is not a party, or is a party and has incumbered the equity of redemption, so that the legal estate must be obtained by the transferee from the representatives of the mortgagee, there are two cases: *first*, if the mortgagee died before 1882, the right to be admitted vested in his customary heir; *secondly*, if the mortgagee died after 1881, the right to be admitted vested in his personal representatives (C. A. 1881, s. 30); so that in the one case his heir, in the other case his personal representatives, must be admitted, and then surrender to the use of the transferee subject to the equity of redemption existing under the conditional surrender.

(2) If the mortgagee was admitted on the conditional

surrender, the right to be admitted on his death appears to be vested in his heir (Copyhold Act, 1894, s. 88, replacing Copyhold Act, 1887, s. 45); though perhaps, in cases where the mortgagee died after 1881 and before the 16th September, 1887 (*n*), there may be some doubt whether the right to be admitted vested in his customary heir or in his personal representatives (see *Re Mills*, 37 Ch. D. 312, where it was held that it vests in his customary heir; but in S. C. on appeal, 40 Ch. D. 14, the point is left doubtful).

In either case, the person who is to be admitted (whether heir or personal representative) will covenant with the transferee to be admitted and to surrender, and will declare a trust of the premises till surrender for the transferee, and will appoint the transferee his attorney to obtain the admittance and make the surrender. (See form, 2 K. & E. 216.)

(3) If the mortgagee was not admitted on the conditional surrender, and the mortgagor is a party and has not incumbered the equity of redemption, the existing conditional surrender will be vacated, and the mortgagor will covenant to make a conditional surrender to the use of the transferee, and will declare a trust of the premises subject to redemption for the transferee, and will appoint him his attorney to make the surrender. (See form, 2 K. & E. 214.)

Where only covenant to surrender.

(B) If the mortgage was made by covenant to surrender not followed by a conditional surrender, all that is necessary, for the purpose of enabling the transferee to acquire the legal estate, is that the mortgagee's personal representative shall convey to the transferee his equitable interest in the land, which carries with it the right to require the mortgagor to make a surrender (*o*). In such a case a prudent transferee will cause the surrender to be made immediately.

Costs of transfers.

There appears to be little authority as to the costs of a transfer. It seems (*Re Radcliffe*, 22 Beav. 201) that, when

(*n*) *I.e.*, the date of the passing of the Copyhold Act, 1887.

(*o*) *Rex* v. *Lord of the Manor of Hendon*, 2 T. R. 484.

the interest is paid regularly, and the mortgagor has never been called upon to pay off the mortgage, he will not be liable to pay the costs of a transfer made without his concurrence.

## PART II.—CONSOLIDATION OF MORTGAGES.

Consolidation of mortgages (*p*).

Where several mortgages of different properties, whether made originally by the same mortgagor to the same mortgagee or not, have become vested in the same person, and where the equities of redemption in all the mortgages have become vested in the same person, or where after that state of things has once existed the equities of redemption have become separated, the mortgagee has a right to decline to allow any one mortgage to be redeemed without the others being redeemed at the same time. This right is called "consolidation," because the effect is that all the property comprised in the several mortgages becomes security for the aggregate amount of all the mortgage debts.

The right of consolidation is modified by the C. A. 1881, s. 17, which provides that, unless a contrary intention is expressed in one of the mortgages, where one or more of them is made since 1881, a mortgagor "seeking to redeem" a mortgage (where "seeking to redeem" applies to the case of a mortgagor or subsequent incumbrancer paying off, as well as to the case of a redemption action, or payment under an order in a foreclosure action) may do so "without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem."

Where the same person owns the equity of redemption of different properties in mortgage to different persons, it is convenient to him to get them all vested in the same mortgagee

(*p*) *Pledge* v. *White* (1896), A. C. 187. See M. L. R. P. 221, where the doctrine is fully discussed.

or mortgagees, as he is then less likely to be harassed by constantly being required to pay off, or find a transferee of, each separate mortgage. For this purpose the practice is to take a separate transfer from each mortgagee to the same transferee, so that each mortgagee has only the deed relating to his own charge to peruse. Each deed is an ordinary transfer, containing an assignment by the mortgagee, "as mortgagee," of the mortgage debt, with the benefit of the powers of sale, &c., a transfer of the mortgaged property, subject to the old proviso for redemption on payment to the transferee, but no power of attorney from the mortgagee, or covenants by the mortgagor are inserted. By another deed, called the consolidation deed, a mortgage for the aggregate amount of all the separate mortgages is framed, containing the covenants by the mortgagor, &c., and giving a new power of sale. The frame of this deed needs some explanation.

Form of deeds of transfer.

Form of deed of consolidation (*q*).

In the absence of the deed of consolidation, the transferee of the separate mortgages has the right as to such of them as were made before 1882, to hold all the property comprised in them as security for the aggregate amount of the separate mortgage debts. He has, however, no power of sale over the aggregate property; but he can sell the property comprised in each mortgage deed by virtue of the power of sale contained in it. He has no covenant for payment of the aggregate amount, though he has the benefit of the covenants contained in each separate deed. All that is absolutely necessary is a deed giving him liberty to sell as a whole all the property comprised in the several deeds. In practice, however, the deed of consolidation is prepared as if it were a mortgage for the aggregate amount, but subject to the securities for the several original mortgage debts. It may be asked: Does not the mortgagor render himself liable to pay the aggregate debt twice over, *viz.*, once in detail under each separate mortgage deed, and again under the consolidation deed? This is provided against as follows:—The consideration is not stated to be the aggregate

(*q*) See the forms, 2 K. & E. 230, 232.

sum now advanced by the transferee, but the several sums paid to the original mortgagees; and, although the conveyance is made subject to the securities for the original mortgage debts, it is also made subject to a new proviso for redemption on payment of the aggregate sum. But, as it is possible that the mortgagor may have created charges on his equity of redemption subsequently to the consolidated mortgages, in which case the new powers contained in or implied by the consolidation deed would be exercisable only subject to such subsequent incumbrances, a distinct declaration is inserted that the powers of sale, &c., given by the original mortgage deeds shall continue in force for the benefit of the transferee.

The right of consolidation is sometimes confounded with that of tacking, but they are very different.

Tacking is where there is a first legal mortgage followed by two or more mortgages of the equity of redemption, and either (*a*) the first mortgagee, having the legal estate, advances his money on the third mortgage, or on a subsequent mortgage, without notice at the time of making the advance of the existence of the second or other intermediate mortgages; or (*b*) the third mortgagee, or a subsequent mortgagee, having advanced his money without such notice, then acquires the legal estate by a transfer of the first mortgage. In either case the mortgagee having the legal estate obtains priority for the whole of his mortgage money over the second or other intermediate equitable mortgagees. To enable a subsequent mortgagee to tack, it is necessary, *first*, that the money should have been advanced by him without notice of the intermediate mortgage or mortgages; *secondly*, that his money should have been originally lent on the security of the land (a judgment debt, for instance, cannot be tacked); and *thirdly*, that he should acquire the legal estate (see 2 Dav. Prec. Part II. 209). Tacking(*r*).

The explanation of the doctrine usually given is that the subsequent mortgagee, advancing his money without notice

(*r*) See as to tacking, M. L. R. P. 216.

of the prior mortgage, has an equal equity with the prior mortgagee to be paid. The equity is not, strictly speaking, equal, for the equity is really to be paid after the prior mortgagee; but, as the subsequent mortgagee knew nothing of the prior mortgage, he acted in good faith; and when, by having or getting in the legal estate, he has an advantage at law, Equity will not take it from him. (See *Marsh* v. *Lee*, 2 W. & T. L. C.) The reader will observe how widely this differs from the doctrine of consolidation. When a mortgagee consolidates mortgages he does not oust a prior mortgagee as he does in tacking; and consolidation takes place in respect of mortgages of different properties; tacking in respect of mortgages of the same property. A mortgagee can consolidate without obtaining the legal estate; to enable him to tack, he must have or get in the legal estate.

## PART III.—DEEDS OF FURTHER CHARGE.

Frame of deed of further charge.

Where a mortgagor obtains a further advance from his mortgagee, he executes a deed of further charge, which contains a recital of the original mortgage, stating the covenants for payment of the principal and interest, and the proviso for redemption, and noticing the provisions, if any, of group IV. (*ante*, p. 151), and the express power of sale, if any. The operative part contains covenants for the repayment of the further advance with interest, and for payment of interest thereon during the currency of the security, the first day of payment being such of the days appointed in the original mortgage deed for payment of interest as follows next after the date of the deed of further charge. No conveyance of the land is necessary, as it is already vested in the mortgagee (except in the case of a mortgage of copyholds, where the conditional surrender has been made but no admittance on it taken); but a declaration is inserted, that the land shall stand as a security to the mortgagee, not only for the original debt and interest, but also for the further advance and interest, and that it

shall not be redeemable until payment to the mortgagee of both sums and interest. Then follows an agreement and declaration that such of the clauses of groups IV., V., and VI. (*ante*, p. 144) as are contained in the original mortgage, and are intended to apply to the further advance, shall so apply. The mortgagee's indemnity clause should be added (2 K. & E. 201). It is convenient to indorse a deed of further charge of this nature on, or to make it supplemental to, the original mortgage, as this saves a recital. The inconvenience (pointed out *ante*, p. 209) attending the engrossing of an indorsed deed will not apply in this case, as the solicitor whose duty it is to engross the deed is the mortgagee's solicitor, who probably has the custody of the original mortgage deed.

Where a mortgage of copyholds is made by conditional surrender on which the mortgagee is not admitted, it is the practice in making a further charge to have a deed containing a covenant by the mortgagor to surrender subject to the prior conditional surrender, accompanied with a declaration of trust and power of attorney in favour of the mortgagee (see 2 K. & E. 201), which will subsequently be followed by a conditional surrender for the new advance; or, if there is no surrender on the rolls subsequent to the original conditional surrender, and the mortgagee has no notice of any subsequent incumbrance, the original surrender may be vacated and a new conditional surrender taken for the amount of the aggregate debt. (See form, 2 K. & E. 202.) It may perhaps be doubted whether in this case a new surrender is absolutely necessary; for, if the mortgagee be admitted, he takes "subject to the rights of all persons interested in the equity of redemption"; and those rights are to redeem on payment of the original debt and the further advance; so that it appears that the charge by deed alone would be sufficient. The student, however, must remember that it is extremely dangerous to depart from the usual practice of conveyancers (*s*).

(*s*) Co. Lit. 377 *b*.

If the mortgagee has been admitted, the deed of further charge is sufficient without any entry on the rolls; for the admittance was "subject to the rights of all persons interested in the equity of redemption"; and this is sufficient notice to all persons that the land is in mortgage, though the amount of the mortgage is not stated.

Where land is added.

If, as often happens, additional land is included in the security when a further advance is made, it is convenient to recite an agreement for the consolidation of the original debt and the new advance, and for securing the aggregate debt and interest. (See form, 2 K. & E. 202.) The operative clauses contain covenants for payment of the aggregate debt and interest, a declaration that the land comprised in the original mortgage shall be discharged from the old proviso for redemption, but shall be "subject to the proviso for redemption hereinafter contained"; a conveyance by the mortgagor, "as beneficial owner," of the additional land; a proviso for redemption of the land comprised in the original mortgage and of the additional land, on payment of the aggregate sum and interest; and a declaration that such of the clauses of groups IV., V., and VI. (*ante*, p. 144), as are contained in the original mortgage, and are intended to apply to the aggregate debt shall so apply. If necessary, the provisions as to insurance, &c., should be extended to the buildings on the additional land. The mortgagee's indemnity clause should be inserted.

In many cases it will be found advantageous by one deed to charge the further advance on the land in the original mortgage, and by another simultaneous deed to mortgage the additional land for the aggregate debt. Where this is done, it is convenient to insert in the deed of further charge a covenant for the payment of the aggregate debt, instead of a covenant for the payment of the further advance: for otherwise it will be necessary to recite both the original mortgage and the deed of further charge, in the deed creating the additional security. The latter deed contains a recital of the deed of further charge, stating the covenants

for payment of the aggregate debt and interest and the agreement for further securing the payment of the aggregate debt "in manner hereinafter appearing." The rest of the deed will be similar to an ordinary mortgage for the aggregate debt, the consideration being "the sum of £——, the repayment whereof is secured to the said [*mortgagee*] as hereinbefore recited."

Further charge and transfer combined.

A further advance is often made on the occasion of a transfer. When this is the case, the deed contains an assignment of the original mortgage debt and securities; and covenants by the mortgagor for payment of the aggregate debt, consisting of the original debt and the further advance, and for payment of interest. The original mortgagee conveys to the transferee the mortgaged property, "freed and discharged from all right or equity of redemption under or by virtue of the said indenture of mortgage, but subject to the proviso for redemption hereinafter contained." The proviso for redemption is on payment of the aggregate debt and interest. Then follows an agreement and declaration that such of the clauses of groups IV., V., and VI. (*ante*, p. 144) as are contained in the original mortgage shall apply to the aggregate debt. The mortgagee's indemnity clause is added.

## PART IV.—RECONVEYANCES.

Reconveyances.

When the mortgage debt is paid off, the mortgagee ceases to have any beneficial interest in the property. It was conveyed to him merely as security for his debt and for no other purpose: and, as soon as his debt is paid off, it becomes his duty to reconvey it to the mortgagor, or, unless he is or has been in possession (see C. A. 1881, s. 15), to any third person as he directs (*t*). *Ante*, p. 149.

(*t*) A mortgagee who has taken possession is not at liberty to give it up without permission of the mortgagor (*Re Prytherch*, 42 Ch. D. 590); if he transfers the mortgage he becomes liable after the transfer for the acts and defaults of the transferee (*Hall* v. *Heward*, 32

Reconveyance should be indorsed.

It is desirable to make the reconveyance by a deed indorsed on the mortgage; but this can be done only where both mortgagor and mortgagee are clients of the same solicitor (see *ante*, p. 209). In this case, unless there have been dealings with the mortgage, all that is required is a conveyance (without any recitals) by the mortgagee "as mortgagee" to the mortgagor, free from "all principal moneys and interest intended to be secured by the within written indenture." See forms in Stud. Prec. 75, 77.

The parcels in a reconveyance are always described by reference to the mortgage deed, not by a substantive description, the reason apparently being that the mortgagee is only bound to reconvey that which is vested in him, and that in ordinary cases he has no knowledge of any change that may have taken place in the description of the land. Even in cases where the mortgage is of long standing so that the parcels may have become changed by inclosure, exchange, or partition, the inclosures, &c., are usually referred to in very general terms (see 2 K. & E. 241 n.).

When circumstances render it inconvenient to indorse the reconveyance, the mortgage must be formally recited, and there must be recitals stating the dealings, if any, with it, and the existing state of the debt; or the reconveyance may be made supplemental to the mortgage, and the subsequent deeds, if any, and will contain a recital of the existing state of the debt. The rest of the deed presents no peculiarity.

Copyholds.

Where the mortgage comprises copyholds, the form of the reconveyance depends upon how they have been dealt with. If there has been a covenant to surrender, the

Ch. D. at 435); and still remains liable for his own acts and defaults done or made while he was in possession; and although a transfer made at the request of the mortgagor would probably operate as a release of these liabilities as between the mortgagor and the mortgagee, it would still leave the mortgagee making the transfer liable to subsequent incumbrancers; for these reasons the exception of mortgagee in possession was introduced into the C. A. 1881, s. 15.

practice is, whether the surrender has or has not been made, to release the debt by deed, though a mere receipt for the money due on the mortgage would in Equity operate as a release from the debt, and would, if no surrender had been made, discharge the land. If the surrender has been made, the mortgagee signs a warrant to enter up satisfaction on the surrender (see form in Stud. Prec. 76; and 2 K. & E. 239), by virtue of which satisfaction is entered up on the Court Rolls so as to discharge the land. If the mortgagee has been admitted, the mortgagor will have to be admitted on a surrender by him.

Equitable mortgages.

Equitable mortgages, whether effected by deposit of deeds with or without a memorandum, or by a formal mortgage of the equity of redemption, are released by the payment of the debt; and therefore, although it was formerly the practice, where there was a formal mortgage of the equity of redemption, to make a formal reconveyance, it is becoming usual, even in this case, merely to take an indorsed attested receipt for the mortgage money. 2 Dav. Prec. Part II. p. 277.

Debt kept alive for benefit of limited owner paying off a mortgage.

If a person having only a limited interest in the equity of redemption (a tenant for life, for instance) pays off a mortgage, the presumption is that he intended to have the charge kept up for his benefit; while, if a tenant in fee or in tail in possession pays it off, the presumption is that he intended to merge it; but the presumption in the latter case may be rebutted by showing that it is to his advantage to keep the charge alive (*u*). In order to obviate any doubt, it is always proper in either case to insert a few words stating clearly the intention of the person who pays off the debt. If it is intended to keep up the charge, the general practice is to take a transfer, although a mere declaration of intention to keep the charge alive would suffice (*x*).

(*u*) See *Adams* v. *Angell*, 5 Ch. D. 634 (cited in M. L. R. P. 219); and *Liquidation, &c. Co.* v. *Willoughby* (1898), A. C. 321.

(*x*) As to the form of reconveyance where a limited owner

Form of reconveyance where mortgagee is dead.

If the mortgagee is dead, the form of reconveyance depends upon the date of his death, as well as on the nature of the property.

*As to the mortgage debt.*—At whatever time the mortgagee died, his legal personal representatives, or, if he made a bequest of the mortgage debt to which they assented, the legatee of the debt, can give a discharge for the debt. In the latter case the legal personal representatives should, if possible, concur, so as to render it unnecessary to keep evidence of their assent.

*As to mortgaged personalty.*—The reconveyance of mortgaged personalty can be made by the legal personal representatives of the mortgagee, or the legatee of such personalty, if the legacy has been assented to.

*As to the legal estate in mortgaged freeholds.*—The reconveyance of mortgaged freeholds is made, *first*, if the mortgagee died before 7th August, 1874, by his heir or the devisee of his mortgage estates: *secondly*, if he died on or after that day, and before 1882, the reconveyance may be made by the heir or devisee, or "on payment of all sums secured by the mortgage" by the legal personal representative of the mortgagee (see the V. & P. A. 1874, 37 & 38 Vict. c. 78, s. 4. The effect of this section being to enable either the heir or devisee, or the legal personal representative to convey, it is safer to obtain a reconveyance from both); *thirdly*, if the mortgagee died after 1881, the reconveyance is made by the legal personal representatives. (See the C. A. 1881, s. 30, *ante*, p. 213.) There appears to be no doubt that, if the mortgagee made a specific bequest of the mortgage debt and a devise of the mortgaged land to the same person, his legal personal representatives could assent so as to vest the legal estate in the legatee, who would then be the person to reconvey, though in this case it would be proper to obtain the concurrence of

redeems, see *Wicks* v. *Scrivens*, 1 J. & H. 215; *Pearce v. Morris*, L. R. 5 Ch. 227. See form of conveyance to a trustee for a tenant for life who pays off the mortgage, 2 K. & E. 233.

the legal personal representatives for the reasons mentioned above, p. 213.

*As to copyholds.*—Where copyholds are mortgaged by covenant to surrender, and no surrender has been made, a discharge of the debt by the legal personal representatives of the mortgagee is sufficient. If a surrender has been made, and the mortgagee has not been admitted, the legal personal representatives can give a warrant to enter up satisfaction. In either of these cases a legatee of the mortgage debt and security whose legacy has been assented to can give the release or warrant in the place of the legal personal representatives, though it is the practice to obtain their concurrence. Copyholds.

Where the mortgagee has been admitted, then, if he died before the 7th August, 1874, his heir or devisee must be admitted and surrender to the use of the mortgagor. If he died on or after the 7th August, 1874, and before 1882, his heir or devisee may be admitted and surrender, or "on payment of all sums due on the mortgage" his legal personal representative can surrender. V. & P. A. 1874, s. 4. If the mortgagee died after 1881, the right to be admitted is in his customary heir (*y*), who must be admitted and surrender to the mortgagor or his successor in title.

## PART V.—SUB-MORTGAGES.

Occasionally a mortgagee wishes to receive only part of his money, and is unwilling to disturb his original investment. Suppose, for instance, that he has advanced £20,000 on mortgage of land, and wants £500; it might be disadvantageous to him to call in the £20,000; and, if he were to ask the mortgagor to pay him £500, the latter, not having £500 and being unable to find a person willing to advance him £500 on a second mortgage, might be compelled to Sub-mortgage (*z*).

(*y*) Copyhold Act, 1894, s. 88, replacing Copyhold Act, 1887, s. 45, *ante*, pp. 213, 214.

(*z*) See form, 2 K. & E. 183.

borrow the whole £20,000 from another person, and thus discharge the whole debt. In such a case, a *sub-mortgage*, or mortgage of the mortgage debt and securities, is resorted to. The subject-matter of the sub-mortgage being the mortgage debt and the mortgaged property, they have to be transferred to the sub-mortgagee, subject to redemption (in our example on payment of £500), with liberty to him to sell them.

The transfer of the debt will be made by an assignment, habendum "to the said [*sub-mortgagee*], [his executors, administrators, and assigns (*a*),] subject to the proviso for redemption hereinafter contained," *i.e.*, to redemption on payment of £500 and interest; and there is added a power of attorney enabling the sub-mortgagee to sue in the name of the original mortgagee for the whole £20,000 (*ante*, p. 190). The property comprised in the original mortgage will be transferred to the sub-mortgagee in the appropriate method, "subject to such right or equity of redemption as the said premises are now subject to by virtue of" the original mortgage, "and subject also to the proviso for redemption hereinafter contained." The proviso for redemption in our example would be on payment of £500 and interest by the original mortgagee to the sub-mortgagee.

The effect of the two provisoes for redemption, in the original mortgage and the sub-mortgage respectively, appears to be the following:—

Under the proviso contained in the original mortgage, the mortgagor can redeem that which he mortgaged, viz., his land (or other property) on payment of £20,000; that is, £19,500 to the original mortgagee, and £500 to the sub-mortgagee; and on doing so, he becomes entitled to a reconveyance of the land from both of them. Under the proviso contained in the sub-mortgage, the original mortgagee can redeem that which he mortgaged to the sub-mortgagee, viz., the debt of £20,000 and the securities for it; and on doing so, be becomes entitled to a reassignment

(*a*) The words in this bracket may be omitted.

of the £20,000 and a reconveyance of the land, subject as to the latter to the proviso for redemption contained in the original mortgage.

In case the original mortgagor should pay off the £20,000, trusts are declared concerning it in the sub-mortgage similar to those contained in a mortgage of a chose in action (*ante*, p. 195); and power is given to the sub-mortgagee to give a receipt for the whole £20,000. These two clauses may probably be omitted in reliance on the C. A. 1881, s. 22, but it appears safer to insert them. The power of sale conferred by the sub-mortgage authorises the sub-mortgagee to sell the subject of his security, *i.e.*, the mortgage debt of £20,000, and the land subject to redemption on payment of £20,000. The sub-mortgagee can exercise the statutory power of sale conferred by the original mortgage; and, if the original mortgage is properly drawn, he can also, as assign of the mortgagee, exercise any express power of sale contained in it. Let us consider the method in which the two powers of sale work. The power contained in the sub-mortgage is only to be exercised if the original mortgagee (the sub-mortgagor) makes default, *i.e.*, if he does not keep down the interest on the £500, or neglects to pay the principal after due notice; but, on the other hand, it can be exercised without reference to the defaults of the original mortgagor; when exercised, it passes the £20,000 and the securities for it, *i.e.*, the benefit of the covenants by the mortgagor in the original mortgage, and the land subject to his equity of redemption. The power contained in the original mortgage is only to be exercised if the original mortgagor makes default, *i.e.*, if he does not keep down the interest on the £20,000, or neglects to pay the principal after due notice; when exercised, it passes the land to the purchaser free from all equity of redemption.

Inquiry should be made before completion of a sub-mortgage from the original mortgagor as to the state of accounts between him and the mortgagee, and notice of the sub-mortgage should be given to him (see *ante*, p. 192).

## CHAPTER IX.

### LEASES.

A LEASE for a term of years, or for a term of years determinable on a life or lives, gives a chattel interest to the lessee, but a lease for a life or lives gives him a freehold interest. Leases for lives have almost fallen into disuse. We shall therefore discuss leases for years only. See M. L. R. P. 158 *et seq.*

Lessor's title.

It is the usual practice for a lessee at rack-rent not to investigate his lessor's title; but, if he omits to do so, and accepts a lease containing the usual covenant by the lessor for quiet enjoyment, so as to negative the covenants implied by the word "demise" (see *post*, p. 270), and it turns out that the lessor was unable to grant a valid lease, owing to some defect in his title that might have been discovered by the lessee if he had investigated it, the lessee has no claim for compensation (*a*).

Agreement for a lease.

Prior to the V. & P. A. 1874 (37 & 38 Vict. c. 78), it was doubtful whether an agreement for a lease implied that the intending lessor would deliver an abstract, and show a good title; though it appears clear that he could not enforce specific performance of such an agreement without showing a good title (*Fildes* v. *Hooker*, 2 Mer. 424; *Baskcomb* v. *Phillips*, 29 L. J. Ch. 380); and that, if he had no title, an action for damages would lie against him by the intending tenant (*Stranks* v. *St. John*, L. R. 2 C. P. 376).

The V. & P. A. 1874 provides, s. 2, that "under a contract to *grant* or *assign* a term of years, whether derived or to be derived out of a freehold or leasehold estate, the

(*a*) *Clayton* v. *Leech*, 41 Ch. D. 103; and see *Baynes & Co.* v. *Lloyd & Sons* (1895), 1 Q. B. 820.

intended lessee or assign shall not be entitled to call for the title to the *freehold*" (*b*). The C. A. 1881, s. 13, provides that, unless a contrary intention is expressed in the contract, "on a contract to *grant* (*c*) a lease for a term of years to be derived out of a leasehold interest with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion." The result is that an intending lessee or underlessee cannot call for the title to the freehold, and that an intending underlessee can call for the production of the lease under which his intending lessor holds (*d*), and the subsequent title thereto, but not for the production of any superior lease. But, if the intending lessee can show that the title is bad, he will not be bound to accept the lease (*e*).

It should always be agreed, on the treaty for the lease, whether the intending lessor is to show any and what title. Where the title is not investigated, the intending lessee should, if the property is situated in a town, or forms part of a building estate, inquire whether the lessor is restricted from using it in any particular manner; as, for instance, whether he is prohibited from using it as a shop; for, if the lessor be restrained from so using it, the lessee cannot put himself into a more favourable position than his lessor, merely by omitting to inquire into the title (*f*). And, even if the lessor falsely states that there is no restriction, though the lessee has a remedy against the lessor, he gains no right to use the property in the forbidden manner; and the case is not altered by the above-mentioned Acts, the lessee or underlessee being in the same position with respect to

(*b*) This Act applies to incorporeal hereditaments; *Jones* v. *Watts*, 43 Ch. D. 574.

(*c*) See also C. A. 1881, s. 3 (1), which provides that (unless a contrary intention is expressed in the contract; sub-s. 9) the *purchaser* of an existing underlease shall not have a right to call for the title to the leasehold reversion, *i.e.*, the lease out of which the underlease was granted.

(*d*) *Gosling* v. *Woolf* (1893), 1 Q. B. 39.

(*e*) *Jones* v. *Watts*, 43 Ch. D. 574.

(*f*) See *Re Cox and Neve's Contract* (1891), 2 Ch. 109, at p. 117; and Dart, V. and P. 980.

notice of restrictions on the user of the land as if he had expressly agreed not to inquire into his lessor's title (*g*).

Entry by lessee before lease is granted.

Prior to the passing of the Judicature Act, 1873, if, after a contract for a lease was entered into, the tenant went into possession, he became tenant at will until payment of rent; and, after payment of rent, he became tenant from year to year, upon the terms of the agreement so far as they were applicable to such a tenancy (*h*); but, until payment of rent, as the tenant had no legal interest, it was in the power of the landlord to eject him; and the landlord could not, until some rent had been paid, distrain for the rent, but was put to his action for use and occupation (*i*). But the effect of the Judicature Act, 1873, is that, since that Act, a tenant who enters under an agreement holds on the same terms, and the landlord can exercise the same rights as if the lease had been actually granted, provided that the case is one in which the Court would enforce specific performance of the agreement (*j*).

Building agreements.

On the treaty for a building lease, it is usually stipulated that, for the purpose of erecting the proposed buildings, the tenant may enter upon the property before the actual execution of the lease. In such a case, it is sometimes intended that, instead of one lease of the whole ground, separate leases of the different houses shall be granted to the builder or his nominees, as the houses are completed. This is perhaps the usual plan, as it is the safest for the tenants; for, if all the ground were included in one lease, and the builder were to grant underleases to the purchasers of the several houses, then, if any one of the underlessees were to do or omit to do anything which would be a breach

(*g*) *Clements* v. *Welles*, L. R. 1 Eq. 200; *Feilden* v. *Slater*, L. R. 7 Eq. 523; *Patman* v. *Harland*, 17 Ch. D. 353.

(*h*) *Doe* d. *Rigge* v. *Bell*, 5 T. R. 471; *Clayton* v. *Blakey*, 8 T. R. 3; 2 Sm. L. C.

(*i*) *Hegan* v. *Johnson*, 2 Taunt. 148; *Dunk* v. *Hunter*, 5 B. & Ald. 322.

(*j*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9; *Swain* v. *Ayres*, 21 Q. B. D. 289; *Lowther* v. *Heaver*, 41 Ch. D. 248; *Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220.

of the covenants in the headlease, the superior landlord would have a right to re-enter as for a breach by the headlessee, and so all the underlessees would become liable to eviction. It is convenient not to grant the actual lease until the houses are finished, for then it is unnecessary to insert the covenants as to buildings, which are sometimes long and elaborate, in the lease. If such covenants were inserted, every sublessee or purchaser would have to ascertain that they had been performed; whereas, by granting the lease after the buildings are completed, this inconvenience is obviated.

"Ground-rent."

Rent reserved on a building lease is small in proportion to the rack-rent (*i.e.*, the full rental value) of the land with houses on it, and is commonly called "a ground-rent" (*k*). If the lease of a house is granted directly to the builder's nominee, the builder joins in the lease for the purpose of acknowledging the receipt of the purchase-money of the house, and of requesting the lessor to make the demise. If the builder takes the lease to himself, he generally does not sublet at rack-rent, but takes from the sublessee a fine, or lump sum of money (of an amount not much less than the sum which he has expended on the house), not under the name of a fine, but as the purchase-money of the house, and sublets the house at a rent a little larger than the ground-rent: this rent is generally called an "improved ground-rent."

Agreement for lease.

The agreement should specify the commencement (*l*) and duration of the term, the amount of rent, and when it is to

(*k*) The estate in reversion on a lease for years is often called a "ground-rent," the rent under the lease being incident to the reversion.

(*l*) But if the date of commencement is not specified, it may be collected from the agreement read as a whole (*i.e.*, from intrinsic evidence); *Re Lander and Bagley's Contract* (1892), 3 Ch. 41 (at p. 47). There is no inference that the term is to commence from the date of the agreement (in the absence of other indications); *Marshall* v. *Berridge*, 19 Ch. D. 233. This applies, of course, to the case of an executory agreement for a lease, and not to an agreement operating as a lease or present demise at law; per Jessel, M.R., *ibid.* at pp. 239, 240.

be payable, and the nature of the covenants to be entered into by the lessor and lessee respectively, or may contain the form of lease in a schedule. The importance of specifying the covenants is pressed strongly on the reader, for in the absence of special agreement the insertion of the "usual" covenants can alone be insisted on, and unfortunately it is very difficult to say what the "usual" covenants are. Mr. Davidson is of opinion, on the result of the authorities, that in the absence of special circumstances the only clauses that can be insisted upon are—covenants by the lessee to pay rent; to pay taxes (except such as are expressly made payable by the landlord); to keep and deliver up the premises in repair; to allow the lessor to enter and view the state of repair; a clause for re-entry on non-payment of rent (*m*); such clauses as, according to the custom of trade or local usage, are usually inserted in leases of a similar nature; and the usual qualified covenant by the lessor for quiet enjoyment by the lessee (*n*).

"Usual" covenants —what are.

It should be provided that, until the lease is executed, the rent shall be paid, and the lessee's covenants observed; and that the lessor shall have the same remedies for non-payment of rent or breach of covenant as if the lease had been executed. This clause, however, though usually inserted, appears to be not absolutely necessary (*Walsh* v. *Lonsdale*, 21 Ch. D. 9).

Costs of lease.

It should also be provided that the lessee shall execute and deliver to the lessor a counterpart of the lease; and it should be declared who is to pay the costs of the lease and counterpart (*Webb* v. *Rhodes*, 3 Bing. N. C. 732). As, however, in the absence of any special stipulation, the

(*m*) But not a clause for re-entry on breach of other covenants; *Re Anderton and Milner*, 45 Ch. D. 476.

(*n*) 5 Dav. Prec. 51 n. See also Seton, p. 1892; Dart, V. and P. 191 *et seq.*; 27 Sol. J. 129, 142, 159, 177; *Cross* v. *Morgan*, 37 W. R. 543; *Midgley* v. *Smith* (1893), W. N. 120. A covenant not to assign or underlet is not a "usual" covenant; *Re Lander and Bayley* (1892), 3 Ch. 41.

solicitor of the lessor prepares the lease at the cost of the lessee (*Smith* v. *Clegg*, 27 L. J. Ex. 300), and the lessor pays for the counterpart (*Re Negus* (1895), 1 Ch. 73), the last-mentioned stipulation is not absolutely necessary, though, if inserted, it may save disputes. If there be any difficulty in getting the costs of the lease, the lessor's solicitor has his remedy against the lessor, who has his remedy over against the lessee (*Grissell* v. *Robinson*, 3 Bing. N. C. 10).

To pass to the consideration of the lease itself, the intention of the parties is that, so long as the lessee pays the rent regularly, and performs the covenants on his part, he shall not be disturbed by the landlord; but that, on the other hand, on his default, the landlord shall have a speedy remedy against him.

Remedies of landlord for rent.

The law gives to the landlord two remedies for his rent (Co. Lit. 43 *b*), viz., distress (*post*, p. 267), and action; and the lessee always enters into an express covenant to pay the rent, so as to turn it into a specialty debt (see *post*, p. 254).

For breach of covenant.

The landlord can maintain an action for damages in respect of the breach of the other covenants by the lessee; and, in some cases, the Court will restrain a contemplated or continuing breach by injunction.

Proviso for re-entry.

A clause, called the "proviso for re-entry," which is generally inserted in leases, gives to the landlord the right of actually evicting the tenant for non-payment of rent or breach of covenant. In the absence of such a proviso, the non-payment of rent or a breach of covenant would not cause a forfeiture of the lease, but would give only a right of action for the rent or for damages for the breach. In the case of a lease for a short term at rack-rent, the proviso for re-entry does not exercise the same deterrent effect on a tenant contemplating a breach of covenant as it does where the lease is for a long term and is a beneficial one (*i.e.*, where the letting value of the premises is greater than the amount of rent under the lease); for, in the former case, the pecuniary loss to the tenant on eviction is small, in the latter case it may be large.

By the proviso for re-entry it is provided (see form in 1 K. & E. 701; Stud. Prec. p. 28) that, "if the rent be in arrear for [twenty-one days], whether legally demanded or not, or if the lessee, his executors, administrators, or assigns, shall make default in performing or observing the covenants by the lessee herein contained, the lessor, his heirs, or assigns may re-enter upon any part of the said premises in the name of the whole, and thereupon the said term of —— years shall absolutely determine." It is obvious that the proviso can be extended so as to guard against any act or omission on the part of the tenant, as, for instance, against his becoming bankrupt (*o*), or allowing any execution to be levied on the premises. The words in the proviso, "whether legally demanded or not," are inserted to avoid the necessity of demanding the rent with all the formalities prescribed at Common Law (as to which see M. L. R. P. 177). Care should be taken to frame the proviso so that it will apply to the breach of a negative covenant, such as the covenant not to assign; for this reason it is safer to use both the words "perform" and "observe," for it has been said that the word "perform" applies to the affirmative, and "observe" to the negative covenants (per Fry, J., *Evans* v. *Davis*, 10 Ch. D. 757; but see *contrà*, per Kay, L.J., *Barrow* v. *Isaacs* (1891), 1 Q. B. at p. 424). The old form of the proviso authorised the lessor to make forcible entry and expel the lessee. This form is still sometimes used in the leases of public-houses: but as forcible entry is an indictable offence under 2 Ric. 2, Stat. 1, c. 8 (*p*), this form should never be employed.

Forcible entry.

Sometimes the proviso, instead of authorising the landlord to enter, declares that in the specified events the lease

Proviso that lease shall be "void."

(*o*) *Hodgkinson* v. *Crowe*, L. R. 19 Eq. 591. As to the effect of the lease being assigned before bankruptcy of the lessee, see *Smith* v. *Gronow* (1891), 2 Q. B. 394.

(*p*) *Edwick* v. *Hawkes*, 18 Ch. D. 199. See 37 Sol. J. 791, 820. But there is no right of action for damages for forcible entry (*i.e.*, it is not a civil wrong), though damages may be recovered for a tort to person or property committed in the course of the forcible entry; *Beddall* v. *Maitland*, 17 Ch. D. 174; see *Jones* v. *Foley* (1891), 1 Q. B. 730.

shall be "deemed null and void to all intents and purposes." The effect of a proviso in this form is to render the lease voidable only at the option of the landlord; for otherwise, on an action being brought for the rent, the tenant might show that he had committed a breach of covenant which had rendered the lease void, and thus claim to take advantage of his own wrong (*Rede* v. *Farr*, 6 M. & S. 121; and see *Davenport* v. *The Queen*, 3 App. Cas. 115, at p. 128).

Statutory relief against ejectment for non-payment of rent.

Courts of Equity have always considered the proviso for re-entry on non-payment of rent as merely intended for securing payment of the rent (see the cases collected in *Bowser* v. *Colby*, 1 Hare, 109), and accordingly have relieved the tenant who had been ejected for non-payment, at an indefinite time after the ejectment, on his paying the rent due with interest and costs. By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210, the time in which the tenant can apply for relief is limited to six months after execution on the judgment in ejectment (see notes to *Sloman* v. *Walter*, 2 W. & T. L. C. 261). By the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1, the Court has power to give relief in a summary manner in the case of any ejectment brought for non-payment of rent (see on these Acts, M. L. R. P. 177)(*q*). Formerly the Courts did not relieve against ejectment on the breach of any covenant other than that for payment of rent (*Descarlett* v. *Dennett*, 9 Mod. 22); and to repair (*Hack* v. *Leonard*, 9 Mod. 91), but they have long ceased to grant relief in the latter case.

For non-insurance.

By the effect of the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), ss. 4 to 9, and 23 & 24 Vict. c. 126, s. 2, as modified by the provisions of the Judicature Act, 1873, which sections are repealed by the C. A. 1881, s. 14 (7), when ejectment was brought, under a proviso for re-entry on breach of the covenant to insure, the Court could relieve against the forfeiture if no loss or damage by

(*q*) The relief can be given if the lessor has acquired peaceable possession without action; *Howard* v. *Fanshawe* (1895), 2 Ch. 581.

fire had happened, if the breach of covenant had occurred through accident, and if a proper insurance was existing at the time of the application to the Court. Notice of the relief having been granted was to be indorsed on the lease, and relief could not be given to the same person twice in respect of the same covenant.

Relief under C.A. 1881, and C.A. 1892.

Under s. 14 of the C.A. 1881, as amended by ss. 4 and 5 of the C. A. 1892 (55 & 56 Vict. c. 13), the Court has power to relieve, at any time before the landlord has re-entered (*r*), on a breach, either before or after the commencement of the C. A. 1881 (*s*), of any condition or covenant (except as mentioned below) in a lease or underlease, or in an agreement for the same where the lessee or underlessee is entitled to have his lease granted. The tenant may apply for relief in the lessor's action, if any, or in any action brought by himself (*t*), and the Court may impose terms as to costs, &c., as a condition of granting relief.

In cases falling within this provision the lessor cannot maintain his action until he has served on the lessee a notice specifying the breaches complained of; and, if the breach is capable of remedy, requiring the lessee to remedy it; and, in any case, requiring the lessee to make compensation in money for the breach (*u*); and until the lessee has failed within a reasonable time after the notice to remedy the breach, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.

Exceptions from relief.

The exceptions to which the provisions for relief do not apply (*v*) are :—

(*r*) *Rogers* v. *Rice* (1892), 2 Ch. 170.

(*s*) *Quilter* v. *Mapleson*, 9 Q. B. D. 672.

(*t*) But not by originating summons; *Lock* v. *Pearce* (1893), 2 Ch. 271.

(*u*) But a notice may be good though it does not require compensation; *Lock* v. *Pearce* (1892), 2 Ch. 328; affirmed (1893), 2 Ch. 271. The notice must be specific; *Fletcher* v. *Nokes* (1897), 1 Ch. 271; *Re Serle* (1898), 1 Ch. 652. Where the breach is of a continuing character, rent up to a past date may also be recovered, and the original notice is sufficient, even though it expired previously to the date up to which rent is claimed; *Penton* v. *Barnett* (1898), 1 Q. B. 276.

(*v*) C. A. 1881, s. 14, sub-s. (6), as amended by C. A. 1892, s. 2.

(1) A covenant or condition against assigning, underletting, &c. (*w*), without licence; but in this case (*x*) the covenant or condition is to be deemed, unless the lease contains a provision to the contrary, to be subject to a proviso that no fine is to be payable in respect of a licence.

(2) A condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of his interest, where the lease is of agricultural or pastoral land, mines or minerals, a house used or intended to be used as a public-house or beer-shop, a house let as a dwelling-house with the use of any furniture, books, works of art, or other chattels, not being in the nature of fixtures; or of any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor or to any person holding under him. In the case of other leases the exception, *i.e.*, the exclusion from relief, applies only after the expiration of one year from the date of the bankruptcy or taking in execution, and only in case the lessee's interest is not sold within that year.

(3) In the case of a mining lease, a covenant or condition for allowing the lessor to have access to or inspect books accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

The above provisions of the C. A. 1881 as to relief against forfeiture for breach of covenant do not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent (*y*).

Protection of sub-lessee.

Where the lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture in respect of a headlease, the Court has power, on the application of an underlessee, to vest in him the property comprised in the lease, for the whole term of the headlease or any less term, upon such conditions as to rent, &c., as the Court thinks fit; but the underlessee cannot require a lease to be granted to him

(*w*) *Barrow* v. *Isaacs* (1891), 1 Q. B. 417; *Eastern Telegraph Co.* v. *Dent* (1899), 1 Q. B. 835.

(*x*) C. A. 1892, s. 3.

(*y*) C. A. 1881, s. 14, sub-s. (8).

for any longer term than he had under the sublease (*z*). An underlessee, if blameless, can be relieved under the above section even against a forfeiture occasioned by the breach by the lessee of a covenant against assignment (*Imray* v. *Oakshette* (1897), 2 Q. B. 218).

Breach of covenant, effect of.

It will be remembered that a breach of covenant in respect *of any part* of the property demised, renders the tenant liable to be ejected from *the whole*, even if parts of the property comprised in the lease have become vested in different persons: and, therefore, where the same lease contains several houses let at separate rents, a provision is sometimes inserted that a breach of covenant or non-payment of rent in respect of any house shall give a right of entry in respect of that house only.

In building or mining leases prior to 1882 it was proper to guard the lessee against forfeiting his lease on committing a breach of covenant not occasioning any serious damage to the lessor. This was effected by declaring that no breach of any covenant, other than the covenant for payment of rent and other specified covenants, should occasion forfeiture until the lessor had given notice to the lessee, and the latter had omitted for a definite time to remedy the breach and make full pecuniary compensation to the lessor. Another plan was sometimes followed, namely, of providing that the power of re-entry should not arise (except on breach by non-payment of rent, &c.) until the lessor had brought an action and obtained damages for the breach. This plan was open to the obvious objection, that it might cause great expense by rendering two actions necessary, one for damages and another of ejectment.

Waiver of, or licence to commit, breach of covenant (*a*).

Occasionally the question arises whether a landlord can

(*z*) C. A. 1892 (55 & 56 Vict. c. 13), s. 4. The application by an under-lessee for a vesting order may be made by defence and counter-claim in the lessor's action for possession; *Wardens, &c. of Sir R. Cholmeley's School* v. *Sewell* (1893), 2 Q. B. 254. This section applies expressly to an under-lessee of part only of the property included in the headlease. It was held that s. 14 of C. A. 1881 did not so apply; *Burt* v. *Gray* (1891), 2 Q. B. 98.

(*a*) See M. L. R. P. 172.

allow the tenant to commit a breach of covenant without prejudice to his right of re-entry in case of any future breach of covenant. There are two cases for consideration: *first*, where the landlord is asked to pardon a past breach of covenant, as, for instance, where the tenant has not kept up the insurance in conformity with his covenant, and on the discovery of his omission makes a proper insurance, and asks the landlord to condone his omission; *second*, where a tenant applies beforehand for leave to commit a breach, as, for instance, if he wishes to insure in an office different from the one in which he ought to insure according to his covenant.

Waiver of past breach: "Implied."

In the first place, where he applies for pardon for a past breach of covenant, there is no difficulty; all that the landlord has to do is to accept rent knowing of the breach of covenant; the acceptance of rent precludes him from ever claiming a forfeiture for the breach unless the breach continues (*Penton* v. *Barnett* (1898), 1 Q. B. 276) (*b*). No writing of any sort is necessary; but occasionally it may be advisable to mention in the receipt for rent that the landlord is aware of and has forgiven the breach of covenant. The reason of the rule appears to be that, when ejectment is brought, the landlord's case is that on a certain day he had a right to the possession of the land, owing to the tenant's interest having determined on or before that day; and by the acceptance of rent the landlord admits that the tenancy still exists (*Goodright* v. *Davids*, Cowp. 803; Co. Lit. 211 *b*).

The rule that acceptance of rent by a landlord, knowing of a breach of covenant, is a waiver of the forfeiture, should always be borne in mind when it is intended to bring ejectment against a tenant for breach of covenant. In this case

(*b*) But it does not prevent him from maintaining an action for damages for the breach; *Cronin* v. *Rogers*, 1 Cab. & El. 348. Where the amount realised by a distress for rent leaves one half-year's rent due, the distress does not operate as a waiver of the reversioner's right of re-entry for non-payment of rent, under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210, which is still in force; *Thomas* v. *Lulham* (1895), 2 Q. B. 400.

no rent accrued due after the breach has been committed must be accepted.

Probably one of the most efficacious methods of frightening a troublesome tenant is to take notice of any breach of covenant committed by him, at the same time informing him that in consequence of it the landlord will refuse to accept his rent. He will probably apply to his solicitor to know the meaning of his landlord's conduct, and will be informed that it is the preliminary to an ejectment.

"Actual" (c).

It may be remarked that actual waiver of the benefit of any covenant or condition in a lease by the landlord only operates as a waiver with respect to the particular breach to which it has reference (d); though formerly it had the effect of destroying the right of re-entry for any subsequent breach.

Licence to commit future breach.

In the second case, where the landlord wishes to grant permission beforehand to the tenant to commit a breach of covenant, the permission, generally called a licence, to be effectual at law, must be granted under seal, unless the lease authorises it to be granted in some other manner (e); but it should be remarked that a landlord who has given permission not under seal to commit a breach, would formerly have been restrained by the Court of Chancery from taking advantage of the breach; and as the defendant can now set up his equitable defence at law by virtue of the Judicature Act, 1873, s. 24, it is not now necessary, though it is the practice, in cases of importance, to grant the licence by deed.

Defeasance.

Formerly, if a licence was given to commit a breach of covenant, or if a covenant or condition was once actually waived, the proviso for re-entry was destroyed (f). To avoid this inconvenient result, the practice was adopted of the tenant executing a deed of defeasance at the time when the licence was given to him. By the defeasance the

(c) See M. L. R. P. 173.

(d) *Doe* d. *Boscawen* v. *Bliss*, 4 Taunt. 735; see 23 & 24 Vict. c. 38, s. 6, set out in M. L. R. P. 174

(e) *Doe* d. *Henniker* v. *Watt*, 8 B. & C. 308; *Richardson* v. *Evans*, 3 Madd. 218; *Doe* v. *Harrison*, 2 T. R. 425.

(f) See *Dumpor's Case*, 1 Sm. L. C. and notes. This was not so in the case of an *implied* waiver.

tenant granted to the landlord a new power of re-entry, on breach of the condition mentioned in the defeasance, a condition which was a copy of that in the original lease, *mutatis mutandis*. The effect of the Law of Property Amendment Act, 1859, commonly known as Lord St. Leonards' Act (22 & 23 Vict. c. 35), ss. 1, 2, and the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 6 (M. L. R. P. 173, 174), is to alter the rule of law and to dispense with the need of a defeasance.

Who are bound to perform lessee's covenants (*g*).

The next questions for our consideration are: Who is bound to perform the covenants contained in the lease, and who has the benefit of them?

The original lessee and his representatives are always bound to perform the covenants entered into by him, even if the term has been assigned, and that even if the assign becomes bankrupt and the trustee in bankruptcy disclaims the lease (*Smyth* v. *North*, L. R. 7 Ex. 242). This is sometimes an important practical question where the lease contains onerous covenants, as, for instance, to rebuild a house in case of fire; for, even if the original lessee has long since parted with the lease, still he or his representatives are bound to perform the covenant. See M. L. R. P. 165.

Assigns—rules in Spencer's Case.

The question whether the assigns of the original lessee are bound as between themselves and the lessor to perform the lessee's covenants appears to depend on the nature of the covenant. (*Spencer's Case*, 5 Rep. 16 *a*; 1 Sm. L. C.) A covenant which extends to "a thing *in esse* parcel of the demise," binds the assigns whether they be named or not. As an example of this, take a covenant to repair in a lease of an existing house—here the tenant for the time being is bound to repair according to the covenant, whether assigns are named or not.

A covenant which concerns something to be newly done on the thing demised, will bind the assign if he be named in the covenant, but not otherwise. Suppose that, in the lease of a piece of land, the lessee covenants to build a

(*g*) See this subject fully discussed in M. L. R. P. 165 *et seq.*

house on it; his assign is bound to perform the covenant if the lessee covenants "*for himself and his assigns*," but not otherwise. Thus (*h*) a covenant by the lessee for himself, "his executors and administrators" — not adding "and assigns" — "that he, his executors, administrators, *and assigns*" will build, would not bind the assigns (*i*).

A covenant which has nothing to do with the thing demised, or, to use technical language, which is *simply collateral*, does not bind the assign, even if he be named in it. As, for instance, if the lessee of a farm covenants for himself "and his assigns" to pay a sum annually to the churchwardens, or to build a wall on or to pay taxes, &c., in respect of (*ii*) land not parcel of the demise, his assigns are not bound to do so.

The position of the assign of a lease containing onerous covenants is, however, better than that of the original lessee; for the assign is only liable in damages for breaches of covenant committed while he holds the land, but the original lessee is liable in damages for all breaches during the term. When we say that the assign is liable only for breaches of covenant committed while he holds the land, we must be understood to be speaking of the remedy by action for damages only; for the landlord can distrain for rent due, or recover possession for any forfeiture committed before the assignment. As soon as the assign assigns over the land, his liability as between himself and the landlord with respect to any future breach ceases, even if he assign to a pauper; but he may be liable to indemnify the person who assigned to him against future breaches under his covenant for indemnity contained in the assignment to him; *ante*, p. 121.

In cases where the assigns of the lessee are bound to perform his covenants, only those assigns are bound who

(*h*) See M. L. R. P. 169 *n*.

(*i*) But a covenant to keep new buildings in repair (if they are erected), there being no covenant to erect them, binds the assigns even if not named; *Minshull* v. *Oakes*, 2 H. & N. 793.

(*ii*) *Gower* v. *Postmaster-General*, 57 L. T. 527.

take the whole estate of the lessee. A person who takes possession of the land with the assent of the lessee without taking an assignment of the term, an equitable mortgagee, and a person taking an equitable assignment of the term, are not liable to an action for damages on breach of covenant (*k*). It must, however, be remembered that, if the covenant is negative in effect, any person in possession of the land, whether as assign of the whole estate of the lessee, or as under-lessee (*Hall* v. *Ewin*, 37 Ch. D. 74), or merely under an equitable title (see *Luker* v. *Dennis*, 7 Ch. D. 227), may be restrained by injunction from breaking it, and that he cannot defend himself by alleging want of notice of the covenant, as it is his duty to inquire into the title of the lessee (*l*). The landlord can always distrain for non-payment of rent; and, if the lease contains a power of re-entry on breach of covenant, can recover possession on the breach happening.

Who is bound to perform, and entitled to benefit of, lessor's covenants.

The obligation of performing the lessor's covenants, with respect to the subject-matter of a lease made after 1881, is annexed to the reversion immediately expectant on the term granted by the lease, and may be enforced against the person entitled to the reversion so far as the lessor has power to bind the reversion by the person in whom the term is from time to time vested, *i.e.*, the legal owner of the term. See the C. A. 1881, s. 11. Probably the effect of the enactment is to render it unnecessary for the lessor to covenant for "his assigns" except in cases where the covenants affect land not comprised in the lease. See as to the burden of the lessor's covenants, M. L. R. P. 172.

Who has benefit of lessee's covenants.

The question, who is entitled to the *benefit* of the lessee's covenants, is rather difficult. (See M. L. R. P. 170.)

At Common Law the rule was extremely inconvenient;

(*k*) *Moore* v. *Greg*, 2 Ph. 717; *Cox* v. *Bishop*, 8 De G. M. & G. 815; *West* v. *Dobb*, L. R. 4 Q. B. 634; 5 Q. B. 460.

(*l*) *Parker* v. *Whyte*, 1 H. & M. 167. Even a mere occupier, having notice of restrictive covenants, has been restrained by injunction from violating them; *Mander* v. *Falcke* (1891), 2 Ch. 554; *Wilson* v. *Hart*, L. R. 1 Ch. 463.

the doctrine being that, though an estate could be assigned, a contract could not; or, as it is expressed in the preamble of the statute (32 Hen. 8, c. 34) passed to remedy the evil, "no stranger to any covenant, action, or condition can take any advantage or benefit of the same by any means or ways in the law, but only such as be parties or privies thereto." To consider an example: The lessee of a house covenanted to keep it in repair; the lessor sold his reversion, but he could not assign the benefit of the covenant, so that on breach of covenant by the tenant, the new landlord could not bring an action in his own name; the only method that he could adopt would be to obtain permission from the original lessor to bring it in his name. At the time of the Reformation, when a large part of the Church lands fell into lay hands, this inconvenience attracted notice, and an Act was passed (32 Hen. 8, c. 34) which in substance gave the "heirs, executors, administrators, and assigns" of the lessor the same remedy against the "lessees, their executors, administrators, and assigns" as the original lessor had against the original lessee; and in like manner gave the same remedy to the executors, administrators, and assigns of the lessee against the heirs, executors, administrators, and assigns of the lessor in respect of the covenants entered into by the original lessor as the original lessee had against him (*m*).

A difficulty arose in the application of this statute to leases granted under a power of leasing contained in a strict settlement (*post*, p. 393); for the remainderman is not the assign, and may not be the heir, of the donee of the power. It was, however, decided that in such cases the lease, which took effect as a declaration of the use, was carved out of the estate of the grantee to uses, and that therefore every remainderman was an assign within the meaning of the Act (*n*).

(*m*) M. L. R. P. 170.

(*n*) *Whitlock's Case*, 8 Rep. 69 *b*; *Hotley* v. *Scot*, Lofft, 316; *Isherwood* v. *Oldknow*, 3 M. & S. 382.

A further difficulty arose. The covenant ran with the reversion; but, if that reversion was destroyed, no person could enforce the covenants. For example, if A. leases to B. for ninety-nine years, and then B. leases to C. for twenty-one years, and B.'s term is surrendered to A., the reversion, viz. B.'s term, to which the covenants entered into by C. are incident is gone, and A. had no remedy on them. Several ineffectual attempts were made by Parliament to obviate this inconvenience (*o*); but now by the C. A. 1881 (s. 10), the rent and the benefit of the covenants and conditions contained in a lease made after 1881 and having reference to its subject-matter, and to be observed or performed by the lessee, are annexed to the reversion immediately expectant on the term granted by the lease, and can be recovered and enforced by the person from time to time entitled, subject to the term, to the income of the land leased. This enables the person entitled to the income, *i.e.*, the owner, whether legal or equitable, of the reversion, to sue for rent or breach of covenant.

Severance of reversion.

Where the reversion created by a lease made after 1881 is severed, the lessee's covenants having reference to the subject-matter of the lease can be enforced by each reversioner, so far as they relate to his reversion; and the benefit of the lessor's covenants having reference to the subject-matter of the lease can be enforced against each reversioner so far as they relate to his reversion (*p*).

The provisions usually inserted in a lease vary so materially according to the nature of the property that it is difficult to give any detailed analysis of a lease that would be of use to the reader. The usual clauses may perhaps be arranged as follows (see form in Stud. Prec. 26):—

Analysis of lease.

1. Parties.
2. Recitals (when necessary).

(*o*) The Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 6; 8 & 9 Vict. c. 106, s. 9. See M. L. R. P. 171.

(*p*) C. A. 1881, ss. 10, 11. *Mayor, &c., of Swansea* v. *Thomas*, 10 Q. B. D. 48; *Baynton* v. *Morgan*, 21 Q. B. D. 101 22 Q. B. D. 74.

3. Consideration.
4. Demise.
5. Parcels—easements, licences, &c.
6. Reservations and Exceptions, if any (see *ante*, p. 99).
7. Habendum.
8. Reddendum.
9. Lessee's covenants.
10. Power of distress (if inserted) and proviso for re-entry.
11. Lessor's covenants.

To consider these in order:

Parties. 1. It is not unusual after naming the parties to describe them as "lessor" and "lessee" respectively at the commencement of the lease, and to define these words, either there or at the end of the lease, as including, in the case of a lessor seised in fee, "his heirs (*q*) and assigns;" or, if he be a termor, his "executors, administrators, and assigns;" or, if he grant the lease under a power, "the person or persons for the time being entitled to the reversion of the premises hereby demised expectant on the term hereby granted," adding, in either case, "where the context so requires or admits;" and, in the case of the lessee, as including "his executors, administrators, and assigns, where the context so requires or admits." Where this is done, the words "heirs and assigns," or "executors, administrators, and assigns" will be omitted throughout; but the lessee will generally covenant "for himself and his assigns" (*ante*, p. 241), and, if the covenants by the lessor relate to land not demised by the lease, he will covenant "for himself and his assigns."

Recitals. 2. It is unusual to insert recitals in the lease. Even where the lease is granted by virtue of a power contained in a will or marriage settlement, instead of reciting the instrument creating the power, we refer to it

(*q*) It may be argued that, as by the L. T. A. 1897, s. 1, the reversion will on the death of the lessor devolve on his personal representatives, they ought to be included in the definition, but this appears to be hardly necessary.

in the operative part of the lease. Where the property is in mortgage, and both mortgagor and mortgagee concur in the lease, no notice is taken of the relation between the parties; but the mortgagee "demises at the request of" the mortgagor, who "demises and confirms." Where an underlease is to be made, and the original lease contains a covenant not to underlet without licence, the usual method is for the original lessor to give his licence to underlet by a separate document; but he may be made a party to the underlease, in which case the demise is made by the under-lessor "with the consent of" the original lessor; and usually the head-lease is recited, so as to show that the underlease could not be granted without the licence of the original lessor (1 K. & E. 728 *n*).

Consideration.

3. The consideration is generally stated to be "the rent (or "rents and royalties") and covenants on the part of the lessee, hereinafter reserved and contained."

Demise.

4. In old leases several operative words are employed, as "demise, set, lease, and to farm let;" but the only operative word used in modern practice is "demise," or "let," except in the case of a lease under an express power, where the word "appoint" is sometimes added.

Parcels.

5. The parcels should be carefully described; and it is generally convenient to describe them by reference to a plan. Formerly short "general words" followed the parcels, but as a lease is a "conveyance" within the C. A. 1881 (see s. 2 (v) ), they are now omitted in reliance on the Act (s. 6). If the property comprised in the lease has not been usually severed in enjoyment from the adjoining land of the lessor, care should be taken to specify the easements, if any, which the lessee is to enjoy over such adjoining land.

Liberty to commit waste.

A lessee for years has no right to do any act which amounts to waste (*r*); if therefore it be intended that he

(*r*) Or perhaps to permit waste; see M. L. R. P. 164. Stat. Marlbridge (52 H. 3, c. xxiv.); *Yellowly* v. *Gower*, 11 Ex. 274; *Davies* v. *Davies*, 38 Ch. D. 499; *Re Cartwright*, 41 Ch. D. 532. As to waste generally see M. L. R. P. 41. The erection of a permanent

should be at liberty to do so, it should be distinctly specified what waste he is to be at liberty to commit. A list of the various forms of waste will be found in Co. Lit. 53 *a*, and in Woodfall's Landlord and Tenant (pp. 646, *et seq*).

Licences (*s*).

In building or agricultural leases the only easement or licence that is commonly met with is the grant of a right of way: in mining leases the licences are of great importance. The most common are the following:—

(*a*) To work the mines.

(*b*) To make works, such as engine-houses, spoil-banks, &c.

(*c*) To quarry stone.

(*d*) To dig clay and make bricks.

(*e*) To use water.

(*f*) To make railways and other roads.

(*g*) Instroke, or the right to work the demised mine through adjoining mines.

(*h*) Outstroke, or the right to work adjoining mines through the demised mines.

(*i*) Power to let down the surface by mining operations (*t*).

The grant of licences in mining leases is usually followed by a provision that in the user of the licences the lessees shall do as little damage as possible to the lessor or the surface of the land.

Occasionally a licence is given without any estate in the

building by a lessee without the consent of the lessor may be waste if it is an injury to the inheritance; *Jones* v. *Chappell*, L. R. 20 Eq. 539, explaining Co. Lit. 53 *a*; but see *Doherty* v. *Allman*, 3 App. Cas. 709, and *Meux* v. *Cobley* (1892), 2 Ch. 253, as to "meliorating waste."

(*s*) None of the "licences" mentioned in the text are strictly speaking "licences"; they are profits *à prendre* or easements, M. L. R. P. 344.

(*t*) In the absence of such a power, which is not very generally inserted, the lessee cannot work the mines so as to let down the surface; as in common right the owner of the surface is entitled to have it properly supported. *Eadon* v. *Jeffcock*, L. R. 7 Ex. 379; *Harris* v. *Ryding*, 5 M. & W. 60; *Davis* v. *Treharne*, 6 App. Cas. 460. See these cases discussed in "The Law of Support, &c.," by H. L. Stephen.

land. For example, in some parts of the country it is the custom, instead of granting mining leases, to grant a mere licence to enter upon the lands and win and take away the minerals. Where this course is adopted it must be carefully stated whether the licence is to be exclusive or not, *i.e.*, whether the licensee is to be the only person entitled to win minerals (*u*).

Reservations and exceptions.

6. Following the grant of licences to the lessee come the reservations and exceptions in favour of the lessor (*ante*, p. 99). The student may find some difficulty in understanding the proper place for a reservation in a purchase deed or a lease. The word "reservation" comprises both rights such as easements and profits *à prendre*, and rents. The reservation of rights of the former class operates, strictly speaking, as a regrant of such rights to the vendor or lessor by the purchaser or lessee, and is inserted immediately after the parcels, while the reservation of rents follows the habendum.

Right of sporting.

Thus, when the right of sporting is retained by the lessor, it is expressed in the lease to be "reserved;" but such a right operates as a regrant by the lessee to the lessor of the right to enter and pursue the game, which right is a profit *à prendre* (*x*).

Reservations.

The principal reservations are, in leases of houses:—

(*a*) The right of drainage from adjoining houses belonging to the lessor through the demised premises.

(*b*) Rights of way.

(*c*) Timber, with or without power to cut it.

(*u*) *Newby* v. *Harrison*, 1 J. & H. 393; *Carr* v. *Benson*, L. R. 3 Ch. 524; see *Duke of Sutherland* v. *Heathcote* (1891), 3 Ch. 504; (1892), 1 Ch. 475, where the cases are discussed.

(*x*) *Doe* d. *Douglas* v. *Lock*, 2 A. & E. 743; *Wickham* v. *Hawker*, 7 M. & W. 63; *Ewart* v. *Graham*, 7 H. L. C. 331; *Hooper* v. *Clark*, L. R. 2 Q. B. 200. See as to sporting rights, The Ground Game Act, 1880 (43 & 44 Vict. c. 47); and as to overstocking, *Farrer* v. *Nelson*, 15 Q. B. D. 258.

In agricultural leases :—

(*a*) Timber, with the right to enter, fell, and carry away.

(*b*) Minerals, with power to enter, get, make merchantable, and carry away.

(*c*) Sporting rights.

In mining leases :—

(*a*) Coal for barriers, &c.

(*b*) All minerals not comprised in the demise, with full powers of working, and liberty for that purpose to use the lessee's works.

(*c*) To dig clay and quarry stone for the lessor's private use.

(*d*) To use lessee's tramways.

(*e*) To enter and inspect the lessee's workings.

A provision should be made that the lessor in using the reservations shall do as little damage as possible to the lessee.

Habendum.

7. The *habendum* is "to the lessee, his executors, administrators, and assigns, for the term of —— years, from the —— day of ——." The words "lessee, his executors, administrators, and assigns," are often omitted. The term of years may be made to commence from a day already past, or from the date of the lease, in either of which cases the lease is called a lease "in possession;" or the term may be made to commence from a future day, in which case the lease is called a "reversionary" lease. In either case, the lessee has until entry a mere *interesse termini* (*y*), unless the lease operates only as a declaration of the use (*z*), so that the lessee acquires the legal estate and possession by virtue of the statute.

"Reversionary lease."

(*y*) See per Bayley, J., in *Edge* v. *Strafford*, 1 Cr. & J. 391, 398; and M. L. R. P. 159.

(*z*) See *Fox's Case*, 8 Co. Rep. 93 *b*. The power of leasing formerly inserted in strict settlements operated as a declaration of the use, so that, where a lease was granted under the power, the lessee acquired the term without entry. See *post*, p. 393. But this is not the case in leases made under the powers of the S. L. Acts, 1882 to 1890. See S. L. A. 1882, s. 20, *post*, p. 422.

"Lease of the reversion."

Where the land is already in lease, the reversioner can grant a lease "of the reversion," sometimes called a "concurrent" lease. A lease of this nature confers on the lessee, as from the commencement of the term granted by it, a right to the rents reserved by and the benefit of the covenants contained in the original lease (C. A. 1881, s. 10).

Some examples will make this more clear. A. grants a lease to B. for a term of years to commence at once. This is a lease in possession, and as soon as it is granted B. acquires an *interesse termini*, and can acquire the term itself by entry. A. grants a lease to B. for a term of years to commence at Christmas next. This is a reversionary lease. If it were a lease for life (*a*), it would be void as creating a freehold to commence *in futuro;* but, if it be a lease for years, B. will become entitled to an *interesse termini* at Christmas, and can acquire the term itself by entry. A. grants a lease in possession to D., who enters. Then A. grants another lease of the same property to E. to commence at once. Formerly E., as he could not enter, acquired a mere *interesse termini* (*b*), unless D. attorned to him; but as the necessity for attornment no longer exists, he acquires the term itself immediately on the execution of the lease. The lease to E. is a lease of the reversion. If, however, the lease granted to E. was to commence *in futuro*, it would be a reversionary lease of the reversion, and upon the occurrence of the day of its commencement it would become a lease of the reversion.

Sometimes the term is made determinable at the option of one or either of the parties—this is the common case of a lease for seven, fourteen, or twenty-one years. In the case of an underlease which is intended to comprise practically

(*a*) The phrase *interesse termini* has no application to a freehold lease. *Eccles. Commrs.* v. *Treemer* (1893), 1 Ch. 166, at p. 171.

(*b*) *Smith* v. *Day*, 2 M. & W. 684; *Blatchford* v. *Cole*, 5 C. B. N. S. 514; *Rawlyns's Case*, 4 Co. Rep. 52 *a*; *Edwards* v. *Wickwar*, L. R. 1 Eq. 403. See Shep. Touch. 275, 276; 2 Platt on Leases, 58.

all the interest of the original lessee, the term is made to determine a few days before the original lease, so as to leave a reversion in him.

Reddendum.

8. The *reddendum* specifies the amount of rents and royalties, and the times at which they become payable. An additional rent is sometimes made payable on the doing of some specified act by the tenant, or on his omitting to perform some specified covenant. Thus it is not uncommon to reserve an additional rent of £10 per acre if the tenant ploughs up old meadow land; the object being to prevent the tenant from committing the act, the additional rent is placed so high as to render it extremely improbable that it would be to his advantage to incur it.

Penal rent.

Sometimes, where the lessee covenants to insure, and there is power to the lessor to insure on his default, an additional rent equal to the moneys paid by the lessor for insurance is reserved, so as to enable him to recover the moneys by distress. See the form, 2 K. & E. 681.

Where an additional rent is made payable on breach of covenant and there is a proviso for re-entry on breach, the lessor may have an option, if a breach of covenant occurs, either to recover the additional rent or to proceed by action to recover possession; *Weston* v. *Managers of Met. Asylum District*, 8 Q. B. D. 387; 9 Q. B. D. 404. But this depends on the form of the lease, for it may appear from the terms of the lease that the lessee is to have a right to do the act on payment of the additional rent; see *French* v. *Macale*, 2 Dr. & War. 274, and *Legh* v. *Lillie*, 6 H. & N. 165, both cited in Interp. 431, 432.

Royalty.

A rent is an ascertained sum; but the amount of a royalty or galeage rent, which is a sum to be paid in respect of every ton or other certain quantity of minerals raised, or in respect of every 1,000 bricks sold, or the like, depends on the act of the tenant. It is obvious that, as the amount of a royalty depends entirely on the amount of minerals, &c., worked by the tenant, it is desirable that there should be a fixed minimum payment. This is

generally effected by reserving a fixed rent, called a "dead rent," as well as a royalty. "Dead rent."

A "render" is where a certain proportion of the minerals themselves are to be delivered to the lessor. Render.

A "footage" or "acreage" rent is a rent payable per acre a foot thick of minerals, and so in proportion for a greater or less thickness. Footage or acreage rent.

A "way-leave rent" is a sum payable according to the quantity of minerals drawn over specified roads or tramways. Way-leave rent.

A "spoil-bank rent" is a sum payable according to the quantity of rubbish deposited. Spoil-bank rent.

A clause called a "strike clause" is often inserted in mining leases, and provides for the total or partial cesser of the rents during a strike, or during a lock-out made with the approval of the local mining association. Strike clause.

In cases where the lessee is allowed to raise in each year such a quantity of minerals as would produce royalties equal to the dead rent without paying any royalty, a clause, called an "average clause," is often added, providing that, if the lessee raises in any year a less quantity of minerals than would produce royalties equal to the dead rent, he may make up the deficiency in the next two or three (as may be arranged) succeeding years without paying royalties for it. Average clause.

The days on which the rent and royalties are to be paid must be stated. It is generally proper to stipulate for the last quarterly or half-yearly payment to be paid a short time (say a calendar month) in advance, as this enables the lessor to distrain for the rent before the determination of the lease. It is also convenient to stipulate that, if the lease be determined by re-entry by the landlord for breach of covenant, a proportionate part of the rent up to the day of entry shall be paid. Time of payment.

It is the practice in some places to insert in leases of manufacturing premises a provision suspending the rent during rebuilding in case of destruction by fire or tempest, Suspension of rent on destruction by fire, &c.

or inevitable accident. See, as to the meaning of "inevitable accident," *Saner* v. *Bilton*, 7 Ch. D. 815.

To whom reservations are made.

Where the lessor is seised in fee, the rent is generally reserved to him, "his heirs and assigns," unless these words are omitted in reliance on an interpretation clause. If the estate be in settlement, and the lease be made under a power contained in the settlement, or under any of the statutory powers, there is an apparent difficulty in seeing to whom the reservations should be made, as the person who becomes entitled by virtue of the settlement on the death of the lessor may not be his heir. It is settled, however (*Whitlock's Case*, 8 Co. Rep. 69 *b*), that if the reservation be made to the lessor and his heirs, or to the lessor and to every person to whom the inheritance or reversion shall appertain during the term, it shall in either case be good, for the law will distribute it to any one to whom any limitation of the use is made. But in the same case it was agreed that the best way is to reserve the rent generally, *i.e.*, not to any particular person, and to allow the law to make the distribution. See Shep. Touch. 115.

Covenants by lessee.

9. As already stated, the nature of the covenants contained in a lease depends entirely upon the nature of the property. We intend, therefore, to discuss only a few of the more important.

I. Covenants for payments by lessee of

($\alpha$) Rent.

($\beta$) Rates and taxes.

II. Covenants having reference to keeping up the value of the property with respect to

($\gamma$) Repairs.

($\delta$) Insurance.

($\epsilon$) Waste, altering the nature of the property.

($\zeta$) Using premises in a certain manner only.

($\eta$) State in which property is to be delivered up.

III. Miscellaneous.

($\theta$) Not to assign or underlet.

Reason for inserting the lessee's covenants.

The reader may ask—Why is it necessary to insert covenants for the payment of rent or against the commission of waste, since in the absence of such covenants the landlord has his remedy by action against the tenant for the time being? The answer is that, by the insertion of the covenants, the lessor obtains a personal remedy against the lessee even after he has assigned the lease (*c*). If the lessee assigns the land, and the assign commits waste, the landlord may, if he thinks fit, bring an action against the lessee on his covenant. The personal remedy against the lessee is of additional use, for the following reason: "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if the house be destroyed by tempest or by enemies, the lessee is excused. But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; and therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it" (*d*). It is also convenient for the lessee to know the principal obligations thrown on him.

Rent.

(*a*) Although the words "yielding and paying" in the reservation of the rent amount to an express covenant by the lessee for payment (*e*), it is the practice to insert a covenant for payment. Where the lessor is to receive royalties, the lessee should covenant to weigh and keep accounts of the working of the minerals, and to allow the lessor to be present at the weighing, and to inspect the accounts or an abstract of them, and to take copies of them.

Accounts.

(*c*) *Auriol* v. *Mills*, 4 T. R. 94 See as to the effect of surrender of part of lease on the covenant, *Baynton* v. *Morgan*, 22 Q. B. D. 74.

(*d*) *Prince Rupert's Case*, *Paradine* v. *Jane*, Aleyn. 26; S. C. Sty. 47, *Shubrick* v. *Salmond*, 3 Burr. 1637; *Bullock* v. *Dommitt*, 6 T. R. 650.

(*e*) *Hellier* v. *Casbard*, 1 Sid.

If there are extensive underground workings, the lessee should be bound to keep accurate plans, and to deliver copies free from expense (or at cost price) to the lessor.

Rates and taxes (*f*).

(*β*) It is often intended that the tenant shall pay all rates and taxes. A stipulation that the tenant shall, as between himself and the landlord, bear the landlord's share of the property-tax, would be void (*g*); but the same end might probably be attained by reserving a larger rent than that actually intended to be paid, with a proviso for a variation in amount with the variation of the property-tax; *Colbron* v. *Travers*, 12 C. B. N. S. 181. The most sweeping words for including all rates and taxes are "all rates, taxes, duties, charges, assessments, and outgoings whatsoever, whether parliamentary, parochial, local, or of any other description which are now or may at any time hereafter be assessed, charged, or imposed upon the demised premises or on the owner or occupier in respect thereof." When it is intended that the landlord should, so far as the law admits, take his rent without any deduction, the words "or on the owner" should not be omitted: for it has been held that if an Act of Parliament directs a rate to be assessed "on the owner" of the premises, and the words in question are inserted, the tenant is bound to indemnify the landlord against the rate; but, on the other hand, if these words are omitted, and the tenant covenants only to pay the rates, &c., imposed "on the demised premises," or "on the tenant or occupier in respect thereof," he is not liable (*h*). In a short lease any "sums recoverable from the lessor by any local

266; *Porter* v. *Swetnam*, Sty. 406; see Interp. 419, 420.

(*f*) The cases on the construction of covenants to pay rates and taxes, &c., are collected in 28 Sol. J. 778, 787, 795, 803, 814; 43 Sol. J. 4, 1 K. & E. 683, 697. See also Foa, L. & T. 148.

(*g*) The Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 73, 103. An agreement that if the tenant will continue to pay his rent in full without any deduction in respect of landlord's property-tax paid by him, the landlord will repay to the tenant all sums which he has paid or shall pay for the tax, is not contrary to the Act. *Lamb* v. *Brewster*, 4 Q. B. D. 220, 607.

(*h*) *Tidswell* v. *Whitworth*, L. R. 2 C. P. 326; *Rawlings* v. *Briggs*,

or public authority under the provisions of the Public Health Acts or Metropolis Management Acts" are sometimes excluded (*i*).

Occasionally the lessor covenants to pay the rates and taxes. In this case, if the rateable value of the property is at the time when the lease is granted, or afterwards becomes, larger than the rent payable to the landlord, the tenant who pays the rates, &c., in the first instance, is only allowed to deduct so much as is payable in respect of the rent payable to the landlord, and not the total sum payable. (*Smith* v. *Humble*, 15 C. B. 321.)

Repairs (*k*).

(γ) The covenants with respect to repairs inserted in the lease of a house are—

1st. To repair and keep the premises in good repair.

2nd. To paint the outside and inside at certain times in a prescribed manner.

3rd. To allow the lessor to enter and view the premises, and on his giving written notice of want of repair, to repair within three months.

3 C. P. D. 368; *Allum* v. *Dickinson*, 9 Q. B. D. 632. Tenants have got off where no such word has occurred as "charge," "duty," or "outgoings," or where there have been no words extending to charges upon the owner, or where there are words indicating an intention that the landlord is to pay; per Wright, J., *Smith* v. *Robinson* (1893), 2 Q. B. 53.

(*i*) See Foa, L. & T. 151 *et seq.*, and consider *Brett* v. *Rogers* (1897), 1 Q. B. 525; *Baylis* v. *Jiggens* (1898), 2 Q. B. 315; *Wix* v. *Rutson* (1899), 1 Q. B. 474.

(*k*) The measure of damages for breach of a covenant to repair must be the damage to the reversion, not the sum required to repair; *Henderson* v. *Thorn* (1893), 2 Q. B. 164. In estimating the liability in damages of an underlessee on his covenants, the liability of his lessor on the covenants in the head lease must be taken into account if the under-lessee had notice of the original lease; *Conquest* v. *Ebbetts* (1896), A. C. 490. No damages can be claimed in respect of natural operation of elements on original faulty construction; *Lister* v. *Lane* (1893), 2 Q. B. 212. As to the meaning of "good tenantable repair" see *Proudfoot* v. *Hart*, 25 Q. B. D. 42; *Crawford* v. *Newton*, 36 W. R. 54; Foa, L. & T. 177. A lease under the S. L. A. 1890, s. 7, is invalidated, while a lease under the S. L. A. 1882, s. 6, is not invalidated, by an exception of "reasonable wear and tear."

It is the almost universal practice for a tenant for a term of twenty-one years and upwards to covenant to repair generally, but where the term is less than twenty-one years, or where the house is of small value, the lessor sometimes covenants to do substantial repairs to the walls, drains, and roof. Though such a covenant by the lessor produces no inconvenience where he resides near the property or has a resident agent, it is most inconvenient where this is not the case; for, on the tenant stating that repairs are required according to the covenant, the lessor may be forced to take a journey for the purpose of ascertaining whether the statement is correct.

It should be remembered that giving notice to repair under the covenant to repair on notice is a waiver of any forfeiture that may have happened under the general covenant to repair (*Doe* d. *Morecraft* v. *Meux*, 4 B. & C. 606): while a notice to repair "in accordance with the covenants" of a lease is not (*Few* v. *Perkins*, L. R. 2 Ex. 92).

The repairing covenants in the case of a farm, mines, or quarries, respectively, are very different, and depend upon the special circumstances of each case.

In a farming lease the tenant generally covenants to keep the buildings, gates, hedges, ditches, roads, &c., in repair, on being found specified materials by the lessor. (See as to the construction of such covenants, Interp. 420, 421.)

In a mining lease the lessee should covenant not to injure the mines, to protect them from encroachments, to keep the works in repair, to fence pits and railways, and possibly to leave certain parts of the minerals unwrought as support to the surface, or as bulwarks against water from the neighbouring mines. It may be necessary to make some special provisions as to tramways, and as to the disposal of rubbish by way of spoil-banks or otherwise.

In the lease of a quarry, where the nature of the working is to use open pits, so that the whole of the soil above the stone quarried has to be removed, thus leaving a large hole, it is sometimes provided that the lessee shall fill up the hole

and replace the surface soil after the stone has been worked, so as to leave the surface fit for agricultural purposes. It may also be necessary to insert covenants to repair the roads leading to the quarry.

In the lease of a brickfield the tenant should covenant to preserve the two top spits of soil, and replace such soil after the clay has been removed, so as to leave the land fit for agricultural purposes.

Destruction by fire.

Where the covenant to repair is unqualified, the lessee must repair, even if the premises be burnt down. (*Bullock* v. *Dommitt*, 6 T. R. 650.) If either lessor or lessee insures, whether pursuant to a covenant or not, the other of them can require the Insurance Office to cause the insurance moneys to be laid out in rebuilding the premises (*l*), *if the property insured be a house or buildings* situated within the Bills of Mortality, but not in other cases unless the lease contains express provisions as to the application of the insurance moneys. (*Edwards* v. *West*, 7 Ch. D. 858; *Rayner* v. *Preston*, 14 Ch. D. 297; S. C. 18 Ch. D. 1.) In all cases it is advisable, and where part of the property demised consists of machinery and the like, it is essential, that the covenant for insurance (1 K. & E. 689), should also provide for the application of the insurance money in reinstating the property. (*Lees* v. *Whitely*, L. R. 2 Eq. 143). Where there is a general covenant to repair by the lessee, and the lessor voluntarily insures in his own name, the lessee has no equity to compel the lessor to expend in rebuilding the moneys received from the Insurance Office on the premises being burnt down, or to restrain the landlord from suing for the rent till the premises are rebuilt. (*Leeds* v. *Cheetham*, 1 Sim. 146; *Loft* v. *Dennis*, 1 El. & E. 482.)

Insurance.

(δ) Where the lease, not being an agricultural lease, comprises buildings, machinery, furniture, or other property that is likely to be damaged by fire, it is a common practice

(*l*) *Ex parte Gorely*, 4 De G. J. & S. 477; 5 N. R. 22; 13 W. R. 0, where the facts are more fully stated. See *Ex parte Gorely*, discussed, *ante*, p. 158.

for the lessee to covenant to insure, and keep them insured, for a certain sum in an office to be approved by the lessor, either in the joint names of lessor and lessee, or of one of them only, with power to the lessor to insure and pay the premiums in default of the lessee; and it is usual to secure the payment of the premiums by an additional rent (*ante*, p. 252), which can be distrained for. The policy may be left in the custody of the lessee, he covenanting to produce it and the last receipt for the premiums on demand, and to lay out all moneys received under the policy in rebuilding.

If the lessor covenants to insure, the lessee should covenant not to do anything to increase the rate of insurance.

The covenants which we have hitherto considered are *positive* covenants by the lessee, *i.e.*, covenants that he will do some specified thing: the covenants of the next two classes are chiefly *negative* covenants, *i.e.*, covenants that he will abstain from doing some specified thing.

Covenants as to waste.

(ε) Before the passing of the Statute of Marlbridge (1267) (52 H. 3), lessees for life or years lay under no prohibition of waste at the Common Law because they came in by the act of the lessor, and he might have provided against it in the lease. (2nd Instit. 145.) By that statute, an action for damages was given to the landlord; and by the Statute of Gloucester (1278) (6 Edw. 1, c. 5, repealed by the Civil Procedure Acts Repeal Act, 1879, 42 & 43 Vict. c. 59), the land wasted was made liable to forfeiture (*m*). In the absence of express contract, it is doubtful whether a tenant for years is bound to refrain from permissive waste (*n*).

The covenants intended to restrain the lessee from

(*m*) The writ of waste was abolished by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 36.

(*n*) M. L. R. P. 164; Co. Lit. 53 *a*; 2nd Instit. 145; notes to *Greene* v. *Cole*, 2 Wms. Saund. 251; *Yellowly* v. *Gower*, 11 Ex. at 293; *Davies* v. *Davies*, 38 Ch. D. 499; *Harnett* v. *Maitland*, 16 M. & W. 257; notes to *Bowles' Case*, in Tud. L. C. R. P. The question whether destruction of a house by fire is waste is discussed in 37 Sol. J. 77.

committing waste or altering the nature of the property are—

In the case of a house and pleasure grounds:

(*a*) Not to alter the frontage or cut the main walls or timbers of the house.

(*b*) Not to destroy timber.

In the case of a farm:

(*a*) Not to break up meadow or pasture.

(*b*) Not to cut trees.

(*c*) Not to sell manure or certain crops.

(*d*) Not to work mines.

In the case of mines:

(*a*) Not to remove any engines, engine-houses, buildings, &c.

(*b*) To remove any buildings built by the lessee that the landlord may require him to remove; and other covenants of a like nature, varying with the circumstances of each case.

Covenants against carrying on trades, &c.

(ζ) In some cases the lessor of a house, especially where he carries on a trade or business in the neighbourhood, stipulates for the insertion of a covenant on the part of the lessee not to use the demised premises, or permit them to be used, for the same trade or business (*o*). The observance of a covenant of this nature can be enforced in Equity against the lessee or an underlessee (*p*).

Where the lessor has many houses in the neighbourhood, he often insists on the insertion of a covenant against carrying on any trade or business, or certain specified trades; for he may think that trade being carried on in any one house would lower the rentals of his adjoining property.

(*o*) Carrying on a hospital (*Bramwell* v. *Lacy*, 10 Ch. D. 691; *Tod-Heatly* v. *Benham*, 40 Ch. D. 80; *Portman* v. *Home Hospital Association*, 27 Ch. D. 81), a school, whether for boys (*Doe* d. *Bish* v. *Keeling*, 1 M. & S. 95), or girls (*Kemp* v. *Sober*, 1 Sim. N. S. 517), or a boarding house in connection therewith (*Hobson* v. *Tulloch* (1898), 1 Ch. 424), or a home for working girls (*Rolls* v. *Miller*, 25 Ch. D. 206, 27 Ch. D. 71), is a breach of this covenant.

(*p*) *Hall* v. *Ewin*, 37 Ch. D. 74.

There is, perhaps, no clause in leases which has given rise to so much litigation as the clause under consideration; the contest being between the lessee carrying on a particular trade which he alleges not to be prohibited, and the lessor who contends that it is. (See the cases collected in 5 Dav. Prec. 153, n., and Woodfall, L. & T. Chap. XVII. s. 4.)

In the older forms of this covenant the plan adopted was to specify prohibited trades. There is an obvious objection to this course if the lease be for a long term, as new trades are constantly invented. In a lease made at the beginning of the present century no one would have introduced a prohibition against refining petroleum; but that particular trade is now one of the most dangerous known. The different forms that are now in use are, *first*, a prohibition against using the premises for any purpose except a private dwelling-house; *second*, against using them as a shop or warehouse, or suffering any profession, trade, or business to be carried on thereon; *third*, a prohibition of offensive businesses or trades; *fourth*, a prohibition of certain specified trades or businesses only; and *fifth*, a prohibition of any trade or business without the licence of the lessor. (See forms, 1 K. & E. 300, 692.)

"Free" public-house.

Where the lease is of a public-house and the landlord is a brewer, a covenant is commonly inserted to force the lessee to purchase his beer, &c., from his landlord (*q*). This is so generally inserted as to give rise to the term "tied." A public-house, the lease of which contained no such covenant, is termed "free," as the tenant can purchase his beer where he will. (See 1 K. & E. 747, n.)

Cultivation of a farm.

In the lease of a farm, covenants are often inserted to compel the tenant to cultivate in some particular manner. The nature of these covenants depends entirely on the

(*q*) As to such covenants binding an assignee of the lease with notice, see *Luker* v. *Dennis*, 7 Ch. D. 227; as to the right of the lessor's assigns to enforce them, *Clegg* v. *Hands*, 44 Ch. D. 503; *White* v. *Southend Hotel Co.* (1897), 1 Ch. 767.

method of farming generally adopted in the district. In the absence of any such covenants, there is an implied covenant by the lessee that he will use the farm in a good and husbandlike manner according to the custom of the district, or, as it is called, "the custom of the country." (*Powley* v. *Walker*, 5 T. R. 373.) In like manner leases of mines or minerals contain covenants as to the manner in which they are to be worked, depending entirely upon the circumstances of each case.

In the leases in use on one of the largest estates in England, no special provisions are inserted as to cultivation, except a general covenant to use the farm in a husbandlike manner, and as to the cultivation during the last four years of the term. The leases are for twenty-one years. If the tenant wishes to renew his lease, he applies for a renewal at the expiration of the first seventeen years, so as to hold the farm for two terms of seventeen years without being bound to any special form of cultivation.

Covenant not to hold an auction.

Sometimes a covenant is inserted that no auction shall be held on the premises. The object is twofold: in the first place, it is intended to save the adjoining property of the lessor from the annoyance which would be occasioned by the concourse of persons if sales by auction were habitually carried on; and, in the second place, it is intended to guard against the damage that might be occasioned to the property on which the auction is held by a concourse of persons even on one occasion only.

Covenant to deliver up in particular state.

($\eta$) A covenant is often inserted as to the state in which the premises are to be delivered up at the end of the term.

Fixtures.

In the absence of express stipulation, every fixture put up by the tenant belongs to the landlord (*Gibson* v. *Hammersmith & City Railway Co.*, 2 Drew. & Sm. 603), except fixtures, &c., removable by a tenant under the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 34, and except "tenant's fixtures," *i.e.*, fixtures put up by the tenant for ornament, or for his convenience, or for the

purposes of trade (*r*), which are but slightly attached to the freehold, and can be detached without doing any serious injury to it. If, however, the tenant neglects to remove tenant's fixtures during the term, they belong to the landlord. (*Pugh* v. *Arton*, L. R. 8 Eq. 626; *Ex p. Brook*, 10 Ch. D. 100.) Lists of fixtures removable by the tenant will be found in Woodfall L. & T., and in Smith L. & T. In the case of a lease, for a short term, of a house already completed, where it is intended that the tenant shall not have the right to remove any fixtures, it appears sufficient for the covenant to provide for the delivery up of "the said premises, together with all additions and improvements made thereto, and all fixtures of every kind in or upon the said premises, or which during the term may be affixed or fastened to or upon the same, in such good and substantial repair and condition, and so preserved as aforesaid (*i.e.*, as provided by the covenants to repair, &c.), and in such state and condition as shall be consistent with the due performance of the several covenants hereinbefore contained." It will be observed that this form of covenant is quite general; everything that is a fixture on the premises at the date of the lease, at any time during the term, and at the end of the lease, must be delivered up.

Sometimes it is preferred to have a schedule of the existing fixtures annexed to the lease, and the tenant covenants to deliver them up, or sometimes to deliver them up together with any other fixtures that may be on the demised premises at the end of the lease.

Where the lease is for a long term, so that the original fixtures may presumably be worn out before the expiration of the lease, the better course is to provide that the lessor may enter within the last seven years of the lease and take

(*r*) *Elwes* v. *Maw*, 3 East 38 (S. C. and notes in 2 Sm. L. C.); *Bishop* v. *Elliott*, 11 Ex. 113. These are removable by a tenant as against a mortgagee of the freehold; *Sanders* v. *Davis*, 15 Q. B. D. 218. See as to "fixtures," M. L. R. P. 24, and Leake, Us. & Prof. ch. viii. p. 103.

an inventory of the fixtures, or of fixtures of certain specified classes, and that the lessee shall deliver them up in good condition, &c., to the lessor at the end of the term.

Farming lease.

In the case of a farming lease, it is rarely necessary to provide for the delivery up of the fixtures in the farmhouse, the value of which is generally small; the important thing is to provide for the state in which the ground is to be left as regards cultivation. Formerly it was necessary to state what manures, &c., are to be paid for on the determination of the lease; but this is now provided for by the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61).

Mining lease.

In leases of mines and quarries, the stipulation generally is that all works or erections of a permanent nature, such as buildings, railways, and watercourses, shall be delivered up in good repair; while pumps, machinery, and working plant are generally to remain the property of the tenants, with an option on the part of the landlord to purchase them at a valuation.

Not to assign or underlet.

(θ) The covenant not to assign or underlet is intended to prevent the premises falling into the possession of an insolvent or man of bad character. In cases where the property comprised in the lease is adjoining to other property of the lessor, it may be of great importance to him to have a veto on the occupation of the premises by any person whom he dislikes, or whose business he objects to, and so in other cases, such as the lease of a farm, where the manner in which the occupier uses the property may be of importance to the lessor. This can be effected by inserting a covenant on the part of the lessee "not to assign or underlet the premises without the consent in writing of the lessor" (*s*). The covenant should extend to the assigns of the lessee, as otherwise it is doubtful whether they will be bound by it. (See *Williams* v. *Earle*, L. R. 3 Q. B. 739; *West* v. *Dobb*,

(*s*) The Court cannot relieve the lessee against forfeiture for breach of this covenant (*Barrow* v. *Isaacs* (1891), 1 Q. B. 417; *Eastern Telegraph Co.* v. *Dent* (1899), 1 Q. B. 835 C. A.), but can relieve an underlessee; *Imray* v. *Oakshette* (1897), 2 Q. B. 218; see *ante*, p. 237.

L. R. 4 Q. B. 631 note, L. R. 5 Q. B. 460; see the observations in 1 Sm. L. C. p. 69.) Unless there is an express condition to the contrary, a provision against payment of a fine for the licence to assign is implied; C. A. 1892 (55 & 56 Vict. c. 13), s. 3.

The following points have been decided upon the construction of the covenant (5 Dav. Prec. 193 *et seq.*):—

Underletting.

*First*, that if the covenant is *not to assign*, underletting is not prohibited. (*Crusoe* d. *Blencowe* v. *Bugby*, 2 Wm. Bl. 766.) (*t*).

Deposit of lease by way of mortgage.

*Second*, that the covenant not to assign or underlet is not broken by the deposit of the lease by way of equitable mortgage. (*Doe* d. *Pitt* v. *Hogg*, 1 Car. & P. 160.) In this case the mortgagee holds a security of very doubtful value. If, however, the lease be a head-lease, out of which underleases have been granted with the licence of the lessor, a security may be created in the manner following: The lessee deposits the lease with the mortgagee and simultaneously executes a deed, containing the ordinary mortgage covenants, by which he appoints the mortgagee his attorney, with power to appoint a substitute, to collect the rents. Trusts are declared of the rents similar to those contained in a common receivership deed (*ante*, p. 172), with the exception that, if default is made in payment of the principal after notice requiring payment, the mortgagee is to be entitled to apply the surplus rents in payment of the principal after keeping down the interest. The outline of the deed above given is similar to that indicated in 6 Bythewood by Sweet, 405.

Lease taken in execution.

*Third*. The restriction against assignment does not apply so as to cause a forfeiture on the lease being taken in execution (*Doe* v. *Carter*, 8 T. R. 300), or on the bankruptcy of the lessee; and the trustee in bankruptcy can sell without

(*t*) Where partners are lessees, it is not clear that an assignment by one of his share to the other is a breach of covenant. It was decided to be a breach in *Varley* v. *Coppard*, L. R. 7 C. P. 505; but see the remark of Jessel, M. R. *Corp. of Bristol* v. *Westcott*, 12 Ch. D. at 465.

licence (*Doe* v. *Beavan*, 3 M. & S. 353); but the proviso for re-entry is sometimes framed so as to make the lease determinable on its being taken in execution, or on the bankruptcy of the lessee, his executors, administrators, or assigns.

Trustee in bankruptcy can sell without licence.

The marriage of a woman before 1883, by which the term passed to her husband, was no breach of the covenant.

Marriage of female lessee.

Occasionally the covenant is qualified by the words "such consent not to be arbitrarily refused." It has been decided that "arbitrarily" means "unfairly and unreasonably," and that the lessee cannot recover damages against the lessor for an arbitrary refusal, or compel him to give consent where he refuses arbitrarily; but that an arbitrary refusal by the lessor leaves the lessee at liberty to assign without his consent. (*Treloar* v. *Bigge*, L. R. 9 Ex. 151; *Lehmann* v. *McArthur*, L. R. 3 Ch. 496; *Sear* v. *House Property Investment Society*, 16 Ch. D. 387; *Bates* v. *Donaldson* (1896), 2 Q. B. 241. *Sheppard* v. *Hongkong Banking Corporation*, 20 W. R. 459.)

Consent not to be refused arbitrarily.

Sometimes the covenant is qualified by declaring that the consent is not to be refused "to an assignment, &c., to a respectable person," in which case an assignment to a respectable person (*u*), where the lessor's consent has been asked and refused, is not a breach of the covenant. (*Barrow* v. *Isaacs* (1891), 1 Q. B. 417; *Eastern Telegraph Co.* v. *Dent* (1899), 1 Q. B. 835.)

If a lessee whose lease contains a covenant not to assign, or not to assign without licence, contracts to assign his lease, it is incumbent on him and not on the purchaser to obtain the licence. (*Lloyd* v. *Crispe*, 5 Taun. 249; *Mason* v. *Corder*, 7 Taun. 9.)

10. When land is let, the letting creates a tenure between the landlord and tenant (*w*). The rent reserved is one of the services by which the land is held, the other being fealty

Power of distress.

(*u*) It has been held that consent to an assignment to a corporation may be properly refused. (*Harrison Ainslie & Co.* v. *Corp. of Barrow*, 39 W. R. 250.)

(*w*) 5 L. Q. R. 326; 6 L. Q. R. 69.

(Co. Lit. 142 *b*, 143 *a*), which is now never exacted in practice. At Common Law, if a tenant neglected to perform his services, his lord might enter on the land in respect of which they were due, and distrain. It follows that, in the ordinary case of rent being reserved on the lease of land, the landlord has a right to distrain if the rent be in arrear. The right of distress extends, with some exceptions, over all chattels which are found on the premises, whether they are the property of the lessee or a stranger (Co. Lit. 47 *a*) (*x*).

Agricultural holdings.

Subject to certain exceptions as to rent which is habitually allowed to fall in arrear, a landlord cannot after 1883 distrain for rent of any holding wholly agricultural or wholly pastoral, or partly agricultural and as to the residue pastoral, or in the whole or part cultivated as a market garden, due more than one year before the making of the distress; and stock *bonâ fide* taken in for agistment or on the land for breeding purposes, and agricultural and other machinery hired for use in the tenant's business cannot be distrained for rent in arrear in respect of any such holding. See the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), ss. 44, 45.

Express power of distress.

It will be observed that the right of distress, being a consequence of tenure, does not arise at Common Law where the thing demised is not a tenement—where it is furniture or machinery for instance. In these cases a clause, called a power of distress (which is not affected by the Bills of Sale Acts, 1878, 1882; see *Re Willis*, 21 Q. B. D. 384, at p. 394), is inserted in the lease, being a clause declaring that if the rent be in arrear for so many (generally twenty-one) days, the landlord may enter, distrain, and dispose of the distress,

(*x*) See as to goods of lodgers, the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), and see the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21, amended by 58 & 59 Vict. c. 24), exempting goods which would be protected from execution under s. 147 of the County Courts Act, 1888 (51 & 52 Vict. c. 43); M. L. R. P. 233; and as to the distinction between a lodger and underlessee, *Phillips* v. *Henson*, 3 C. P. D. 26.

for the purpose of discharging the arrears of rent and the costs arising from its not having been paid. It appears that the effect of such a clause is not to enable the landlord to distrain in the strict sense of the word. It operates as a licence to him to enter and act exactly in the same manner as if he were distraining in the strict sense of the word, while the tenant is estopped from denying that the distress is lawful, because the licence is contained in a deed. The difference between a distress in the strict sense of the word and a distress made under such a licence would appear if a stranger's goods on the premises were distrained. In the former case the distress would be lawful, in the latter it would not.

It may be asked—Is it necessary to insert a power of distress in the lease of a furnished house, where the house, in respect of which a tenure is created, and furniture, as to which there is no tenure, are comprised in one demise? It is settled that in this case the whole of the rent issues out of the land (*y*); and, accordingly, the whole rent can be distrained for, and the insertion of an express power of distress is unnecessary.

In cases where chattels are let with the land, and there is no reason for letting them and the land at separate rents, the clause giving a power of distress is unnecessary; but where it is convenient to let the chattels and the land at separate rents (as, for instance, where a lessor is tenant for life of a house and absolute owner of the furniture, so that on his death the house and furniture will pass to different people), it is necessary to insert the clause.

In a mining lease power is often given to distrain on machinery fixed to the soil, which cannot be distrained on at Common Law; *Pitt* v. *Shew*, 4 B. & Ald. 206.

(*y*) *Spencer's Case*, 5 Co. Rep. 17 *a*; *Newman* v. *Anderton*, 2 Bos. & P. N. R. 224; *Farewell* v. *Dickenson*, 6 B. & C. 251. Where freeholds and copyholds are demised together it is doubtful whether the rent issues out of the freehold only, or out of both freeholds and copyholds; *Collins* v. *Harding*, Cro. El. 606.

There is another case in which the power of distress should be inserted. If the land to be leased is in mortgage, and the mortgagor and mortgagee join in making the lease, as the mortgagee has the legal estate, the tenure is created between him and the lessee. He, therefore, can distrain: while, as no tenure is created between the mortgagor and the lessee, the mortgagor cannot distrain. As it is never intended that the mortgagee should have anything to do with the actual management of the property, it would be extremely inconvenient for the mortgagor to have to procure his concurrence in making a distress; and accordingly a distinct power of distress is given to the mortgagor until the mortgagee gives notice to the tenant to pay the rent to him.

Lessor's covenants.

11. We now pass to the covenants on the part of the lessor.

Covenant implied by the word "demise."

It used to be considered that, in the absence of any express covenant, the word "demise," "let," or any similar word (*z*) which actually creates a term, implies two covenants by the lessor: *first*, that he has power to grant the term, and *second*, for quiet enjoyment by the lessee during the term (*a*), but it would appear to be the better opinion that no covenant is implied unless the word "demise" is used (*b*). Both these implied covenants are unqualified, *i.e.*, they extend to the acts of the whole world. The first is broken if the lessor has not power to grant the term which he purports to grant; but the second is only for quiet enjoyment during the term which is actually created, not during the term which the lease purports to create. In the common case of a tenant for life granting a lease, not under a statutory authority, the first of these covenants is broken only if the term exceeds his life; but the latter is not broken if this is the case and the lessee is evicted by the remainderman (*Adams* v. *Gibney*, 6 Bing. 656); for the implied covenant for quiet enjoyment is limited

(*z*) *Hart* v. *Windsor*, 12 M. & W. 68, 85; *Mostyn* v. *West Mostyn Coal Co.*, 1 C. P. D. 145, at p. 152.

(*a*) Interp. 422; M. L. R. P. 379.

(*b*) *Baynes* v. *Lloyd* (1895), 2 Q. B. 610.

to breaches occurring during the continuance of the lessor's interest (*Schwartz* v. *Locket*, 38 W. R. 142) (*c*).

Express covenant for quiet enjoyment.

Owing to the unsatisfactory nature of the covenant implied by the word "demise," it has become the practice to insert an express covenant for quiet enjoyment by the lessor, qualified, however, as only guarding against the acts of himself, and persons claiming under him. Such a covenant is a "usual" covenant. The insertion of such a covenant, according to the rule of construction, "*expressum facit tacitum cessare*," discharges the lessor from his liability under the covenants implied by the word "demise," and substitutes the qualified liability expressed in the covenant, which is of a much less onerous nature. It may be remarked that such a covenant may be safely entered into by a person who has no title to the property comprised in the lease, for if the true owner claiming by title paramount to the lessor disturbs the tenant, the disturbance is *not* the act of the lessor or any person "claiming under" him (*d*). It may be as well to remind the student that there is no provision in the C. A. 1881 for implying this covenant.

Although the express covenant is less beneficial to the lessee than the implied covenants, since it does not extend to eviction by a person claiming by title paramount, on the other hand the lessor's liability does not, as where the covenant is implied, cease with his interest; so that, if a tenant for life grants a lease for years, gives an express covenant for quiet enjoyment, and dies within the term, and afterwards the lessee is disturbed by some one claiming under him, the representatives of the lessor are liable in an action on the covenant.

Covenant for quiet enjoyment by trustees.

A trustee or mortgagee granting a lease is often willing to enter into the covenant for quiet enjoyment, as the liability under it is not of a very serious nature. But in strictness he is not bound to do so; and the only covenant

(*c*) See articles in L. T. 28 Dec. 1889, and L. J. 27 Dec. 1890.

(*d*) See *Harrison Ainslie & Co.* v. *Lord Muncaster* (1891), 2 Q. B. 680, at p. 684, per Lord Esher, M.R.

that he can be required to enter into is a covenant that he has not incumbered (1 K & E. 699, note). If he enters into no express covenant for quiet enjoyment, or against incumbrances, it is safer to make him demise "not so as to imply any warranty or covenant," and thus to exclude the covenant implied by the word "demise."

Danger to lessee who does not investigate lessor's title.

It may be remarked that a lessee who does not investigate his lessor's title is in a very dangerous position; for if a successful action to recover possession is brought against him by a person claiming by title paramount to the lessor, he has no remedy against his lessor, assuming that the latter has entered into the usual covenant for quiet enjoyment restricted to the acts of the lessor and those claiming under him (*e*). The risk is one which may fairly be run where the lease is at rack-rent, but where the lessee intends to lay out a considerable sum on building or improvements, he ought either to investigate the lessor's title, or, at least, to see the conveyance to him. It has been held that a contract to grant a lease is a contract to grant a valid lease, *i.e.*, that by agreeing to let, a lessor implicitly promises that he has a good title to let; *Stranks* v. *St. John*, L. R. 2 C. P. 376. It has been suggested that where no investigation of title takes place, the lessor ought not to refuse to give to the lessee an unqualified covenant for quiet enjoyment, *i. e.*, a covenant on which the lessor would be liable to the lessee on the latter being evicted by anybody; but such a covenant is never given in practice. The reason is obvious: if a lessor granting a building lease enters into such a covenant, and the lessee be evicted by title paramount, the lessor would not only lose his rent, but would be under a liability to the lessee which would be measured by the loss of the latter, *i.e.*, the improved value of the land (*f*).

(*e*) *Kelly* v. *Rogers* (1892), 1 Q. B. 910, where the covenant by the sub-lessor in an underlease was held not broken, though the sub-lessor's breach of the covenants in the head-lease enabled the superior landlord to evict the underlessee.

(*f*) As to the measure of damages, see *Child* v. *Stenning*, 11 Ch. D. 82.

Where a building lease is to be taken of part of a larger property which is usually let for building, and the title of which is known in the neighbourhood, the lessee is often willing to run the risk, and neither to investigate the lessor's title, nor to require the unqualified covenant for quiet enjoyment.

Occasionally, although the lessor does not show his title, he gives a statutory acknowledgment and undertaking in respect of his title deeds.

Covenant to sell property to lessee at a fixed price.

Sometimes the lessor covenants to sell his interest in the premises to the lessee at a certain price if required to do so before a certain day. This covenant is not uncommon in under-leases granted by persons who have built houses on land held by building leases in a new neighbourhood. The option of acquiring a long term thus given to the sub-lessee is an inducement to him to take the lease; and, on the other hand, the price being fixed, he has the benefit of any rise in the value of the property. A similar covenant may, of course, be inserted in a lease from the freeholder (*g*). Where such a covenant is inserted, some provision should be added as to the title to be shown by the lessor in case the tenant elects to purchase: and apparently the option ought to be limited to a period allowed by the rule against perpetuities; Dart, V. & P. 241. See 1 K. & E. 707 note. *L. S. W. Ry. Co.* v. *Gomm*, 20 Ch. D. 562. The case of the renewal of a lease is to be distinguished, 20 C. D. at 579.

Covenant by lessor as to use of his own property.

Occasionally the lessor covenants to use or abstain from using his property in the neighbourhood of that comprised in the demise in some particular manner (*h*). For instance, if the lease be a building lease, he may covenant not to allow houses of an inferior class to be built on it; or that, if any private roads be made over it, the occupiers

(*g*) See, for example, *Re Adams and Kensington Vestry*, 27 Ch. D. 394.

(*h*) As to the meaning of "adjoining or contiguous" premises in covenants of a similar nature, see *Haynes* v. *King* (1893), 3 Ch. 439.

of houses to be built on the land comprised in the lease shall be allowed to use them. As to how far covenants of this nature run with the lessor's land so as to bind it in the hands of those claiming under him, see *ante*, p. 243.

Where the lessor contemplates very large building operations, the plan is sometimes adopted of vesting the whole property in trustees for a long term upon trust not to allow any buildings other than those of a specified class to be erected, to lay out and maintain roads, &c., with power to grant leases.

Roads, repair of.

In all cases where the occupiers of houses have rights of way granted to them, some arrangement as to how and at whose expense the roads are to be kept in order should be made, for, if this is omitted, very great inconvenience may be occasioned. The better plan, perhaps, is for the burden of repairing the roads to be thrown on the landlord, he having the right to recoup himself by levying a rate, not to exceed a certain amount, on every house having the use of them. In this case it used sometimes to be provided that his remedies for the recovery of the rate should be the same as if it were rent in arrear; but, having regard to the Bills of Sale Act, 1878, s. 6 (M. L. P. P. 98), the better plan is to reserve an additional rent equal to the rate, so as to enable the landlord to recover it by distress.

Open spaces for gardens, &c.

Some such plan may be adopted for keeping up an open space as an ornamental garden. In one case that occurred in practice, the lessee of each of the several houses round the garden covenanted with the lessor to keep up the garden in common with the other lessees, and to defray the necessary expenses. It would have been an improvement on this plan if the lessor had covenanted, at the request of any tenant, to sue any other tenant for a breach of the similar covenant contained in his lease.

Fortunately, however, in such cases it usually happens that it is so clearly for the benefit of all parties to keep up the roads, &c., that if the sums demanded for that purpose

are not excessive, they are paid without much investigation into the strict legal right to demand them.

A copyholder cannot, in the absence of a special custom, grant a lease for more than one year without licence from the lord of the manor (*i*). Where this is the case, and the lord refuses to grant a licence to lease for a term, the practice is to grant a lease for one year, containing a covenant by the lessor to grant a lease at the end of the year for the residue of a specified term if a licence can be obtained, and if not, to grant a fresh lease for one year at the end of every year of the term except the last year. Copyholds.

Sometimes, where the lessor is a copyholder and wishes to grant a long lease, the lord is unable by the custom of the manor to grant a licence for a lease for a term exceeding twenty-one years. In such a case the lessor may grant a lease for twenty-one years, with a covenant for renewal if the lord will grant a licence for a fresh lease, which licence the lessor covenants to endeavour to procure.

The covenant for renewal should always be subject to a proviso that all the rent should have been paid and the covenants on the part of the lessee performed, at the time for the renewal. If the covenant be in this form, the lessor can, on the tenant committing a breach of covenant, refuse to renew, and can eject the tenant at the expiration of the term actually granted. (*Job* v. *Banister*, 2 K. & J. 374.)

There is sometimes considerable discussion as to what provisions should be inserted in an under-lease. It will be observed that there are two things to be guarded against, the one in the interest of the under-lessor, the other in the interest of the under-lessee. It is necessary for the safety of the under-lessor that the under-lessee should not do anything with respect to the property which might cause a forfeiture of the head-lease. On the other hand, it is necessary for the safety of the under-lessee that the under- Under-lease.

(*i*) Leake, Law of Prop. in Land, 84 ; Foa, L. & T. 30.

lessor should not forfeit the head-lease by omitting to pay rent or, in cases where all the property comprised in the head-lease is not comprised in the under-lease, by committing a breach of covenant as to the property retained by him.

For these reasons the under-lease will contain (in addition to the covenant to pay rent and other covenants which may be agreed upon between the parties) covenants by the under-lessee with the under-lessor, similar to the covenants by the lessee in the head-lease, with respect to the user of the property comprised in the under-lease, and also any other covenants which must be observed by the tenant in possession in order to avoid a forfeiture; the under-lessee being substituted (*j*) for the head-lessee, and the under-lessor for the head-lessor throughout, except that, in those covenants by which in the head-lease power is given to the head-lessor to enter on, or do some act with respect to the management of, the property, the power should be reserved to both the under-lessor and the head-lessor. Thus, if the head-lease contains a covenant to repair on notice by the head-lessor, the under-lease ought to contain a covenant to repair on notice given either by the under-lessor or by the head-lessor. If the head-lease contains a power to the head-lessor to enter and view the condition of the property, the under-lease will contain a similar power both to the under-lessor and the head-lessor. The under-lessee should also covenant for the performance and observance of all the covenants in the head-lease affecting the property comprised in the under-lease (*k*), except the covenant for the payment of rent and any other covenants intended to be excepted. For instance, if the head-lease comprises a building estate, and contains covenants

(*j*) If the agreement is that the under-lease shall contain the same covenants as are in the head-lease, this substitution cannot be made in all cases; *Haywood* v. *Silber*, 30 Ch. D. 404.

(*k*) This is a covenant of indemnity; *Hornby* v. *Cardwell*, 8 Q. B. D. 329.

as to maintenance of roads and sewers, it will probably be arranged that a person taking an under-lease of a house should not have to maintain them, and then of course these covenants would be excepted. It is apprehended that, if a forfeiture of the head-lease was occasioned by any act or omission of the under-lessee which was a breach of a covenant contained both in the head-lease and the under-lease, the damages recoverable by the under-lessor in an action on the covenant would be determined by the immediate loss occasioned to him by the breach of covenant, and not by the loss arising from the forfeiture of the head-lease (*Walker* v. *Hatton*, 10 M. & W. 249; *Logan* v. *Hall*, 4 C. B. 598). In order to guard against this, a covenant by the under-lessee should be inserted not to do or omit anything whereby the head-lease may become forfeited. The under-lessor should covenant to pay the rent reserved by the head-lease; to perform those covenants, if any, contained in the head-lease, which are to be performed by him; and, in cases where the under-lease does not comprise all the property in the head-lease, to perform all the covenants by the lessee in the head-lease which affect the property retained by the under-lessor; the under-lessor should also give a statutory acknowledgment and undertaking for the production, and safe custody of the head-lease. In cases where the under-lease is at rack-rent for a short term, these covenants by the under-lessor may be omitted. See form in Stud. Prec. 28.

It should be remembered that an under-lessee (whatever may be the nature of the provisions in the under-lease, which, though binding as between himself and the under-lessor, do not affect the head-lessor) is bound in equity as between himself and the head-lessor to observe all the restrictive covenants contained in the head-lease (*m*).

As to the effect of an under-lease which by mistake comprises the whole term in the head-lease, see *Beardman* v.

(*m*) *Ante*, p. 243.

*Wilson*, L. R. 4 C. P. 57; *Williams* v. *Hayward*, 1 El. & E. 1040, and the cases there cited; see also *Pluck* v. *Digges*, 5 Bli. N. S. 31; *Poultney* v. *Holmes*, 1 Stra. 405 (*n*); *Norris* v. *Craig*, 43 W. R. 480.

(*n*) An under-lease for a term equal to or greater than that of the head-lease operates at law as an assignment; see M. L. R. P. 181, n. (*i*), 376. Rent reserved on an assignment may be recovered by action; *Newcomb* v. *Harvey*, Carth. 161. It is by no means clear that it can be recovered by distress. See the discussion at 44 Sol. J. 4.

## CHAPTER X.

### PARTNERSHIP DEEDS (*a*).

THE greater part of the law of partnership will be found in the Partnership Act, 1890 (53 & 54 Vict. c. 39); but the Act is not a complete code of partnership law. It does not declare the law as to goodwill, nor the law as to the administration of the property of the firm on the death or bankruptcy of a partner. With some exceptions the Act made no changes in the law; and it provides (s. 46) that the existing rules of Equity and of Common Law are to continue in force except so far as they are inconsistent with the express provisions of the Act.

Definition of partnership.

The definition of "partnership" given in the Act (*b*) is (s. 1): "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit." Members of companies registered as joint-stock companies, or incorporated by any Act of Parliament, or Letters Patent, or Royal Charter, or of mining companies subject to the jurisdiction of the Stannaries, are not, as such, partners within the meaning of the Act. The mere fact that persons are joint tenants, tenants in common, or otherwise co-owners, does not of itself constitute them partners (s. 2) (*c*).

The mutual rights and duties of the partners *inter se* depend upon the agreement which they have entered into;

(*a*) The beginner should read Underhill on Partnership before he reads this chapter. The advanced student should consult Lindley Partn. or Pollock on Partnership.

(*b*) For a collection of definitions of "partnership," see Lindley Partn., Bk. ch. i. p. 11.

(*c*) As to the distinction between co-ownership and partnership, see Lindley Partn., 51 *et seq.*, cited M. L. P. P. 10.

and such agreement may be either express or inferred from a course of dealing (Partnership Act, s. 19). The terms of the agreement are often embodied in a deed called "Articles of Partnership." The partners are collectively called the firm" (Partnership Act, s. 4), and they trade under a name called "the style" of the firm, in the Act called the "firm name." A firm may not consist of more than ten partners where the business is banking, or more than twenty where it is of any other nature, unless it is registered under the Companies Act, 1862 (25 & 26 Vict. c. 89), or is formed pursuant to some other Act of Parliament, Charter, or Letters Patent, or is a mining company subject to the jurisdiction of the Stannaries. In this chapter we shall not deal with partnerships of any of the excepted classes.

The firm is not a legal person.

It must be borne in mind that in English law the firm has no independent existence as a legal person distinct from the partners of whom it is composed; it is not in the nature of a corporate body (see Lindley, Partn. Introd. 4). But

Joint liability: Agency.

every partner is liable jointly with the other partners for all debts and obligations of the firm, and is the agent of the firm and his other partners for the purpose of the business of the partnership (see Partnership Act, 1890, ss. 5, 9). And commercially for purposes of accounts the firm is in practice treated as a separate entity, though it is not legally such (see Lindley, Partn. 118).

It is remarked by Sir N. Lindley (*d*) that "in framing articles of partnership, it should always be remembered that they are intended for the guidance of persons who are not lawyers; and that it is not always wise to insert only such provisions as are necessary to exclude the application of rules which apply where nothing to the contrary is said. The articles should be so drawn as to be a code of directions, to which the partners may refer as a guide in all their transactions, and upon which they may settle among themselves differences which may arise, without having recourse to Courts of Justice." It should

(*d*) Lindley, Partn. 412.

be remembered also that, if the deed is ambiguous, it will be interpreted as nearly as possible in the manner in which the partners themselves have interpreted it, as evidenced by the manner in which they have actually conducted their business; and that, even where the deed is not ambiguous, the partners may by their conduct waive or modify the provisions contained in it (*e*).

In Articles of Partnership the intending partners are made parties of different parts. Recitals are rarely needed, except where the terms of an existing partnership are to be modified, or where a new partner is to be taken into an existing firm.

Analysis.

The operative clauses in partnership Articles consist of mutual covenants by the partners, and may be divided into the following classes relating to:

1. The nature of the business, the duration of the partnership, and the style of the firm.
2. How the capital is to be provided.
3. The banking account of the firm.
4. Outgoings and profits.
5. Management of business.
6. Not acting so as to injure the firm.
7. Accounts.
8. Death of partner or dissolution of the firm.
9. Provisions for the family of a deceased partner.
10. Arbitration clause.

Nature of business.

1. The nature of the business and the place where it is to be carried on should be stated with clearness: for the authority of a partner, to bind the firm in dealings with strangers, only extends to such dealings as are necessary under ordinary circumstances for transacting the business that the partners have agreed to carry on (*Brettel* v. *Williams*, 4 Ex. 623) (*f*); and although, if any difference arises between the partners relating to the manner of managing the business agreed to be carried on, the minority must give way to the majority, yet if the difference relates to the propriety of engaging in transactions not fairly

(*e*) Partnership Act, 1890, s. 19. (*f*) Partnership Act, 1890, ss. 5, 7.

comprehended in or relating to that business, the wishes of the dissentient minority must prevail (Partnership Act, 1890, s. 24) (*g*).

Duration of partnership.

The time at which the partnership is to commence should be stated. If this is not done, and the articles are dated and executed on the same day, it commences from that day (*Williams* v. *Jones*, 5 B. & C. 108): but very commonly the partnership is made to commence from a past or a future day. This agreement binds only the partners themselves, and does not enable any person who has agreed to become a partner to bind the others by dealings with strangers prior to the commencement of the partnership; and conversely, a person admitted into an established partnership does not thereby become liable to strangers for anything done before he became a partner. The firm may be dissolved at the will of any partner unless a definite duration of the partnership is stipulated for (*Peacock* v. *Peacock*, 16 Ves. 50; Partnership Act, 1890, s. 26). The duration may be for a fixed term, or for the joint lives of the partners, or for a single adventure or undertaking (Partnership Act, 1890, s. 32). But a partnership for a fixed term is dissolved by the death or bankruptcy (*Ex parte Smith*, 5 Ves. 295; Partnership Act, 1890, s. 33) of any partner; for if that were not the case, a new partner, *i.e.*, the personal representative or trustee in bankruptcy, would be introduced without the consent of the other members of the firm (*Skipp* v. *Harwood*, 2 Swans. 586; *Aspinall* v. *London & North Western Railway Co.*, 11 Hare 325); and therefore in the case of a partnership for a term where there are more than two partners, provision should be made (if it be so intended) for the continuance of the partnership, after the death or bankruptcy of any partner, between the other partners. This provision, however, is sometimes not extended to bankruptcy. Similarly, where the duration is for the joint lives of the partners, provision may be made

(*g*) *Const* v. *Harris*, T. & R. 496. *Natusch* v. *Irving*, Lindley, Partn. 316 (5th ed.)

for the continuance of the partnership after one partner dies or is bankrupt, between the other partners. In such cases there is in effect a new partnership created between the surviving or other partners.

Occasionally, where the partnership is to last for a fixed term or during the lives of the partners, power is given to one of the partners to determine it when he thinks fit, or to any of the partners to determine it if certain specified events should happen.

It is not uncommon on a young man being taken into an established firm as a partner, for the other partners, or, if his father is a partner, for his father alone, to have the power of expelling him; but such a power arises only from express contract (Partnership Act, 1890, s. 25). Occasionally power is given to expel any partner becoming insolvent, *i.e.*, unable to pay his debts, or committing specified acts (*h*). It appears that it would not generally be safe to act under such clauses without giving the partner who is to be expelled an opportunity of explaining his conduct (*Blisset* v. *Daniel*, 10 Ha. 493; *Wood* v. *Woad*, L. R. 9 Ex. 190; *Steuart* v. *Gladstone*, 10 Ch. D. 626); though it is possible to frame the clause in such a manner as to enable a partner to be expelled without any reasons being assigned (*Russell* v. *Russell* 14 Ch. D. 471; see p. 480). In the absence of an express provision to the contrary, an expelled partner may carry on a similar business on his own account and solicit the old customers of the firm (*Dawson* v. *Beeson*, 22 Ch. D. 504).

Style of firm.

The style or name of the firm should be stated; and it should be provided that all engagements entered into on behalf of the firm should be entered into under the style (*Marshall* v. *Colman*, 2 J. & W. 268), so as to prevent any doubt whether the contract was really entered into on

(*h*) The Partnership Act, 1890, s. 33, gives an option, if a partner's share of the partnership property becomes charged under the Act for his separate debt, to the other partners to dissolve the partnership.

behalf of the firm (*i*). Occasionally a young man at first entering an established firm is not allowed to bind the firm except in transactions of a specified class; and such an agreement will be enforced against strangers having notice of it (*k*).

Capital.

2. The proportions in which the original capital is to be provided by the partners, and the events upon which and the persons by whom additional capital, if required, is to be provided, should be stated.

If any of the partners are already engaged in a business which is to be carried on by the new firm, and possess stock in trade or business premises which are to belong to the new firm, a value should be put on them, or provisions for determining their value should be made; and it should be stated in the articles that the partner to whom they belong is to be credited with their value as part of the capital originally brought in by him.

If an intending partner is the owner of business premises or of a warehouse intended to be used by the firm, he may agree to hold such property as trustee for the firm, in which case the estimated value of the property should be stated to form part of the capital brought in by him; and, if it be of leasehold tenure, provisions should be made for his indemnity against the rent and covenants of the lease out of the assets of the firm; but it is preferable for him to convey it to trustees for the firm, or to grant a lease of it to trustees for the firm.

Partnership land —devolution of.

On the death of a partner the devolution of the legal estate in land, whether real property or chattels real, belonging to the firm, is regulated by the ordinary rules of law (Partnership Act, 1890, s. 20); but the interests of the partners in such land are, in the absence of a binding agreement to the contrary, personal estate (s. 22); *Attorney-General* v. *Hubbuck*, 13 Q. B. D. 275 : *Re Wilson* (1893), 2 Ch. 340.

(*i*) Partnership Act, 1890, s. 6. Lindley, Partn. 414.

(*k*) Partnership Act, 1890, s. Lindley, Partn. 185.

Form of limitation of partnership property.

Various forms of limitation of property conveyed to a firm as part of their partnership property have been proposed (*l*), the object being to enable the continuing partners to dispose of it after the death or retirement of a partner. So far as death alone is concerned this can be effected by limiting the property to the partners as joint tenants in trust for the partners as part of their co-partnership property, with power to the trustees to deal with the property without the concurrence of the beneficiaries, the result being that on the death of a partner the surviving partners take the legal estate and can sell, etc., without the concurrence of the representatives of the deceased partner. It is obvious, however, that where the limitation is in this form the concurrence of a partner who has retired will be necessary for the purpose of conveying the legal estate. In order to obviate this difficulty it is suggested (1 K. & E. 405) that power should be given to the surviving or continuing partners to appoint new trustees and in particular to appoint a new trustee in the place of any trustee who ceases to be a member of the firm. Where the limitation is in this form the continuing partners can deal with the legal estate in most cases by means of a vesting declaration, (as to which see *post*, p. 362).

Premiums, &c.

It should be stated whether the premium taken by any partner for an apprentice, or the salary or profits of any official position (*m*) or directorship that he holds (*n*) or may obtain, is to belong to him or the firm, and if to the firm, whether it is to be treated as capital or profits. If the partnership is formed for the purpose of working a secret

(*l*) See 33 Sol. J. 102, 119.

(*m*) See as to arrangements by solicitors for sharing profits of offices with other solicitors or unqualified persons, *Sterry* v. *Clifton*, 9 C. B. 110; *Candler* v. *Candler*, 6 Mad. 141, S. C. Jac. 225; *Gordon* v. *Dalzell*, 15 Beav. 351; *Aubin* v. *Holt*, 2 K. & J. 66; *Ex parte Harper*, 1 De G. & J. 180; *Collins v. Jackson*, 31 Beav. 645; *Reg.* v. *Fox*, 1 El. & E. 729; Lindley, Partn. 107, 108; and as to sharing the emoluments of a clerk of the peace, *Palmer* v. *Bate*, 2 Brod. & B. 673.

(*n*) See *Aas* v. *Benham* (1891), 2 Ch. 244.

and unpatented invention, it should be stated who is to have the right of using it after dissolution; for, if this be not done, all the partners will, after dissolution, have the right to work it.

It is generally provided by the Articles that the capital is to be employed in the business.

Interest on capital.

Unless the partners contribute the capital and are to be entitled to the profits in equal shares, it is proper to state at what rate interest is to be allowed to each partner on his share of the capital; for, in the absence of an agreement, partners are not entitled to interest unless they are in the habit of allowing it in their accounts (*Cooke* v. *Benbow*, 3 De G. J. & S. 1; *Millar* v. *Craig*, 6 Beav. 433 (*o*); and to provide that the interest is to be paid (usually yearly on the day for taking the annual general account) before any division of profits.

Occasionally one of the partners has the option of purchasing a further share in the business from the others. The price is generally made to be so many years' purchase of the average yearly net profits from the commencement of the partnership up to the then last general annual account.

Banking account.

3. It is usual to state who are to be the bankers of the firm; and that all moneys belonging to the firm shall be paid into the bank. Sometimes it is also declared that all cheques, &c., received by the firm shall be paid into the bank, and that all outgoings shall be paid by cheque; and occasionally, where a young man is taken into partnership by an established firm, it is provided that he is not to be allowed to draw cheques during a specified term without the consent of the other partners.

Outgoings and profits.

4. Provisions should be made for the payment of all outgoings (the principal heads of which should be specified)

(*o*) But in the absence of agreement, a partner is entitled to interest at 5 per cent. on advances made by him for the purposes of the partnership. Partnership Act, 1890, s. 24 (3); *Ex parte Chippendale*, 4 De G. M. & G. 36; see Lindley, Partn. 390.

out of the receipts and earnings of the business; or, in case of deficiency, by the partners, generally in the proportions in which they are entitled to the profits. This clause only states what the rule is in the absence of any special agreement, and may therefore be omitted where brevity is of importance.

Where any partner holds an office the emoluments of which are not to belong to the firm, but in the performance of the duties of which he may need the assistance of the other partners or of the clerks of the firm, it should be stated what remuneration, if any, or that no remuneration, is to be paid by him to the firm in respect of such assistance.

It is proper to mention any special outgoings that may have to be paid by the firm, although they might appear to be incurred for the benefit of one only of the partners; as, for instance, where it is agreed that the managing partner shall reside in a house to be kept up at the expense of the firm; or that the managing partner of a firm of wine merchants shall entertain their customers at dinner parties at the expense of the firm.

In the absence of special agreement, profits are divisible between the partners equally, though they may be entitled to unequal shares in the capital (*Robinson* v. *Anderson*, 7 De G. M. & G. 239; *Peacock* v. *Peacock*, 16 Ves. 49; Partnership Act, 1890, s. 24). If this is not intended, a clause should be inserted, stating in what proportions profits are to be divided. The clause should also state when they are to be paid. They are generally made payable yearly, immediately after the taking of the annual general account. Occasionally a minimum sum for yearly profits is guaranteed to one of the partners by the others.

When one of the partners has the option of purchasing an additional share in the business from the others, provisions should be inserted as to altering the proportion of profits payable to him in case he exercises his option of purchasing.

It is generally provided that the partners shall be allowed to draw out monthly sums in anticipation of their shares in the profits. If this is done, it should be provided that in case the amount drawn out by any partner in any year exceeds his share of the profits, the excess shall be refunded immediately after the annual general account for the year is taken.

Management of business.

5. In the absence of special stipulation, each partner has a right to take part in the management of (*Rowe* v. *Wood*, 2 J. & W. 553; Partnership Act, 1890, s. 24 (5)), and is bound to attend diligently to, the business of the partnership.

It is therefore of importance to state how much time and attention each partner is to give to the business, and whether any one of the partners is to be bound to give the whole of his time to the business or to be exempt from attending to the business, or prohibited from attending to any particular branch of it. It is not easy at first sight to see why one partner should be prohibited from doing a particular part of the work; but the reason is that, if he did it, he might be brought under the notice of persons who have at their disposal the patronage of some place which one of the other partners hopes to obtain for himself; or he might form connections which would enable him to secure part of the business after a dissolution of the partnership.

If it is intended that every partner is to give all his time and attention to the business, it may be desirable to insert a provision as to the time and duration of holidays.

It is advisable to prohibit the partners from engaging in any business other than that of the firm. This is sometimes extended so as to prohibit them from becoming directors of a company. Stipulations of this nature can be enforced by injunction; *Whitwood Chemical Co.* v. *Hardman* (1891), 2 Ch. 416. In the absence of express stipulation a partner must account for profits made by him in a competing business carried on without the consent of his copartners, or for the use by him of the name or connection of the firm

(Partnership Act, 1890, ss. 29, 30; and see *Aas* v. *Benham*, (1891), 2 Ch. 244).

It is customary to prohibit any partner from hiring, or, except in case of gross misconduct, dismissing any clerk, and from becoming surety; and, if the nature of the business requires it, from engaging in transactions of more than a specified amount without the previous consent of the other partners.

Not acting so as to injure firm.

6. Although, without stipulations to that effect, each partner is bound to be true and just in all his dealings with the others (*Blisset* v. *Daniel*, 10 Ha. 493 (see p. 522); *Maddeford* v. *Austwick*, 1 Sim. 89; 2 Myl. & K. 279), and may not, without the sanction of the other partners, employ the partnership assets, or engage the credit of the firm, except in carrying on the business of the firm, or allow the assets to be taken in execution, or release any debts due to the firm, it is not uncommon to insert provisions to this effect.

Accounts.

7. "Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives;" Partnership Act, 1890, s. 28; *Rowe* v. *Wood*, 2 J. & W. 558. The matter, however, is of such importance that it is the practice to insert express provisions for taking the accounts so as to show the position of the firm ($\alpha$) as regards strangers, ($\beta$) as regards the partners. The provision for the first of these objects consists of a stipulation that proper accounts shall be kept, such as are usually kept by persons engaged in similar businesses. Sometimes it is stated that they are to be posted up under the personal superintendence of one of the partners. The books, are, in the absence of express agreement, to be kept at the place (or principal place) of business; Partnership Act, 1890, s. 24 (9).

In order to ascertain the position of the firm as regards each of the partners, provision should be made for taking an annual general account. This should state the transactions of the firm during, and the assets and liabilities of

the partnership at the end of, the year. In some businesses it is necessary to provide for taking a valuation of some of the assets and liabilities.

It is also proper to provide that the account shall be signed by the partners, and, when signed, shall be conclusive, manifest errors excepted. The excepted errors are mere oversights and blunders, not errors in judgment or opinion.

A provision of this sort does not prevent any partner from taking proceedings to open an account which he may have been led to sign by the fraud or misrepresentation of the other partners.

Death of partner or dissolution of firm.

8. The provisions on the retirement or death of a partner, and on the dissolution of the firm, are sometimes of a complicated character, and require much care and attention.

"Share" of partner.

It must be remembered that the "share" of a partner is not a share in any specific asset, or any specific part of the assets real or personal; but it is "his proportion of the partnership assets after they have been all realised and converted into money, and all the debts and liabilities have been paid and discharged. This it is, and this only, which on the death of a partner passes to his representatives, or to a legatee of his share, . . . and which on his bankruptcy passes to his trustee." Lindley, Partn. 348; and see *Ashworth* v. *Munn*, 15 Ch. D. 369, cited M. L. R. P. 28, note (*x*).

The ordinary provisions on dissolution are that the whole assets of the firm shall be realized, and the proceeds applied in discharge of the liabilities of the firm and the costs of dissolution, and that the surplus shall be divided among the partners and the representatives of a deceased partner in specified shares; see Partnership Act, 1890, s. 39. Provision should be made for contribution by the partners or their representatives in case of insufficiency of the assets, and for the execution by them of mutual releases.

Sometimes it is provided that the goodwill shall belong to one of the partners only. This is not uncommon where a partner in an established business takes in a young man as partner.

When the assets or liabilities may be of a complicated character, requiring time for their realisation or discharge, it is convenient to provide for taking an account and valuation of the assets and liabilities of the firm, and for making provision for the discharge of such liabilities by the partners and their representatives, and for the division of the assets in specie.

It is convenient in this case to give power to carry any of the assets to a suspense account for the purpose of meeting contingent or unascertained liabilities. It should also be provided that proper instruments shall be executed for vesting each share of the assets in the person to whom it is allotted, and for securing the discharge of the liabilities by the persons undertaking so to do, and for the execution by the partners or their representatives of mutual releases.

Sometimes it is provided that, on the determination of the partnership by efflux of time, one partner, or the partners in succession, shall have the option of taking over the business (*p*). In all the older and in many of the modern forms of partnership deeds the transaction is stated to be a purchase by the partner having the option. This language, however, ought to be avoided, as it is not accurate, for there is a great distinction between a contract for sale and a contract as to the manner in which the partnership assets are to be dealt with on dissolution. The partnership deed may provide that all the assets should on dissolution belong to the specified partner, whatever was his interest prior to dissolution in the capital of the firm; and it may be provided that the assets and liabilities of the firm

(*p*) As to the rights of an outgoing partner as between himself and continuing partners in the absence of agreement, see Partnership Act, 1890, s. 42.

shall be vested in the partner exercising the option, while the outgoing partner is (in lieu of his rights in the absence of stipulation) to have a sum of money, ascertained in the manner prescribed by the partnership deed, paid to him. There may be provisions for taking an account of the assets and liabilities of the firm; for payment, within a specified time, by the continuing partner to those retiring of the amount appearing to be due to them for capital, interest, and profits, for the assets becoming the property of the continuing partner; for his indemnifying the retiring partners against the liabilities of the firm; and for mutual releases.

The provisions as to the share of any partner dying or retiring where the firm continues, may take either of the forms following:—

His capital may be paid out to him or his representatives, ($\alpha$) in a lump sum, ($\beta$) by instalments, or ($\gamma$) may remain as a loan to the firm during a term certain.

In each of these cases it is convenient to provide that the general annual account last preceding the death or retirement of a partner shall be conclusive as to the amount of his capital. See *Hunter* v. *Dowling* (1893), 1 Ch. 391; (1893), 3 Ch. 212. Owing to the possibility of the general annual account not having been taken, it is convenient to provide that if this is the case the representatives of a deceased partner may join with the continuing partners in taking the general account up to the last day on which it ought to have been made.

If the share of the retiring or deceased partner is to be paid by instalments, or is to remain as a loan to the continuing partners, some provision should be inserted for securing payment of it. This generally takes the form of a bond by the continuing partners.

If the firm becomes bankrupt before all the debts due at the time of the retirement or death of the partner are paid, he or his representatives cannot prove against the assets of the firm in competition with the creditors of the firm for the money due to him or them. (*Re Dixon*, L. R. 10 Ch. 160;

S. C. sub nom. *Nanson* v. *Gordon*, 1 App. Cas. 195; *Ex parte Blythe*, 16 Ch. D. 620 (*q*).

It is convenient to give the retiring partner, or the representatives of a deceased partner, an allowance of interest on his capital in lieu of profits from the last day of taking the annual account to the day of his retirement or death, so as to obviate the necessity of accounts being taken up to the day of his retiring or dying.

Sometimes the surviving partners have the option of retaining the share of a deceased partner, his representatives becoming sleeping partners; or the representatives have the option of becoming sleeping partners. In either of these cases power should be given to the representatives of the deceased partner to inspect the books and accounts of the firm and to join in taking the general annual account. It may be convenient to give them power to retire in case the annual profits fall below a certain sum.

Provisions for family of a deceased partner.

9. Sometimes an annuity, or a portion of the profits by way of annuity, is made payable on the death of a partner to his widow or executors out of the profits during the continuance of the business by the surviving partners (2 K. & E. 342). Occasionally it is provided that, after the determination of the business by efflux of time, the annuity is to continue payable by the surviving partners or their representatives. It is enacted by s. 2, sub-s. 3 (c) of the Partnership Act, 1890 (which repeals and partially re-enacts the similar provisions of "Bovill's Act," 28 & 29 Vict. c. 86, s. 3), that "a person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such."

Provisions enabling a partner to introduce a son are not

(*q*) This rule does not apply where no joint debt of the firm has been actually proved (*Ex parte Andrews*, 25 Ch. D. 505); nor where the debt is statute barred as against the partner retiring or dead (*Re Hepburn*, 14 Q. B. D. 394).

uncommon (*r*). They generally authorise the father to introduce the son as a partner for the whole or part of the father's share; so that, while the father and son between them are to have the same capital and be entitled to the same share of profits as the father had, the division of the capital and profits between father and son is to be made at the father's option.

It should always be provided that the new partner shall execute a deed of accession to the partnership. See the form in 2 K. & E. 356.

Arbitration.

10. The articles generally conclude with an arbitration clause (*s*).

Dissolution.

On the dissolution of a partnership it is the right of every partner, in the absence of an agreement to the contrary, to have all the assets and also the goodwill of the firm sold. This course is so ruinous that, in cases where the method of winding up the affairs of the firm at dissolution is not provided for by the articles of partnership, and in cases where, though provision is made, it directs a sale of the assets, some arrangement is usually come to between the partners that some of them shall take over the assets in specie, and undertake to discharge the liabilities, and sometimes that they shall have the benefit of the goodwill of the firm.

In the simple case of one of two partners retiring where the other intends to continue the business, a deed will be framed, to which both partners will be parties, containing recitals as to what the assets and liabilities are, what is the balance due to the retiring partner on taking the accounts, and of the agreement to dissolve the partnership. The

(*r*) Such provisions might constitute a voluntary settlement formerly rendering account duty payable under the Customs and Inland Revenue Acts, 1881 (44 Vict. c. 12), s. 38; and 1889 (52 & 53 Vict. c. 7), *A. G.* v. *Gosling* (1892), 1 Q. B. 545. Succession duty might also be payable (but see s. 41 of 44 Vict. c. 12) on the father's death under the Succession Duty Act, 1853, (16 & 17 Vict. c. 51, *A. G.* v. *Brown*, 46 W. R. 145. Estate duty will now become payable on the father's death under the Finance Act, 1894. (See s. 1, as to what duties this covers.)

(*s*) See the Arbitration Act,

operative clauses consist of a declaration that the partnership is dissolved as from a certain day, and of an assignment by the retiring partner "as beneficial owner," in consideration of the payment of the balance due to him, of his share in the assets, property, and goodwill of the firm to the partner who intends to continue the business; with a power of attorney, expressed to be irrevocable (C. A. 1882, s. 8), enabling the latter to use the name of the retiring partner in getting in the assets. This power should be inserted, notwithstanding the provisions of the Judicature Act, 1873 (2 K. & E. 362, *ante*, p. 190) (*t*). When the retiring partner conveys "as beneficial owner," full covenants for title by him are implied (*ante*, p. 106). Occasionally only covenants that he has not incumbered, and for further assurance, are given. When this is intended, the words "as beneficial owner" must be omitted and express covenants inserted. The covenants, other than the covenants for title, by the retiring partner are, that he has not contracted any debts, &c., which affect the continuing partner, except those appearing in the partnership books; to ratify the acts done under the power of attorney; and not to release the debts due to the partnership. Formerly he covenanted not to revoke the power of attorney; but this is now omitted, for, as the power is given for valuable consideration, it cannot be revoked if expressed to be irrevocable (see the C. A. 1882, s. 8). The partner continuing the business covenants to discharge the liabilities of the firm and to indemnify the retiring partner against them. Lastly, the deed contains a mutual release by the partners.

Where part of the assets consists of freeholds or leaseholds, they are often conveyed by a separate deed.

1889 (52 & 53 Vict. c. 49); 1 K. & E. 152 note.

(*t*) In order to avoid unnecessary *ad valorem* stamp duty, the money payable to the retiring partner, which is really purchase money, should be apportioned between those parts of the property which must be conveyed by deed (such as land) and chattels which pass by delivery. See 1 K. & E. 884, and the notes 2 K. & E. 359, 361, 366.

No person can become partner without consent of all the partners.

It is a fundamental rule of the law of partnership that no person can be introduced as a partner without the consent of all the members of the firm. Partnership Act, 1890, s. 24 (7); Lindley, Partn. 366. The reason is obvious. Persons may be willing to trust each other and yet be unwilling to place the same confidence in any one else. Even an assignment of his share by a partner does not enable the assignee to become a partner without the consent of the other partners. If the partnership is at will, the assignment dissolves the partnership: if the partnership is not at will, the other partners may treat the assignment as a ground for dissolution. The only right that the assignee acquires, in the absence of the consent of the other partners, is to payment of what on taking the accounts may be found due to the assignor.

Power to a partner to introduce a new partner.

There is, however, no reason why the partners should not agree either by the articles or subsequently that any one of them may, either during his life or on his death, introduce any person or a specified person into the partnership, with power to assign to the person so introduced the whole or any part of his share in the partnership. When this agreement is entered into by the articles, it is proper to provide that the person who is introduced shall execute a deed, called a "deed of accession," by which he and the continuing partners shall contract to observe the articles of partnership with such modifications as may be necessary owing to his introduction.

Deed of accession.

The deed of accession, in the simple case where one of the partners in exercise of a power in the articles introduces a new partner, and assigns part of his share in the capital to him, contains a recital of the articles, setting out the clauses as to capital, division of profits, the power of introducing a new partner, the restrictions, if any, on such introduction, and the direction that the deed of accession is to be executed; or instead of these recitals, the deed may conveniently be made "supplemental" to the articles (see C. A. 1881, s. 53). Whether the deed is

made supplemental to the articles or not, the recitals will show in what shares the existing capital is held, and the desire of the donee of the power to introduce the new partner, and to assign to him a portion of his share of the capital. The operative clauses consist of, *first*, the assignment by the donee of the power, with the consent of the other partners, of part of his capital to the new partner; and, *secondly*, mutual covenants by the partners (including the new partner) to observe and perform the provisions of the articles "with such variations as are rendered necessary by the introduction of the said C. D. as a partner and the assignment to him by the said A. B. of the said —— share of the capital of the said A. B. as aforesaid and the provisions hereinafter contained;" and that they will observe and perform the provisions of the articles so varied "as if the said C. D. had originally been a party to and had executed the said articles and as if the provisions of these presents had been embodied therein." Then follow any special provisions affecting the new partner; as, for instance, that he may not draw cheques, or that the partner who introduces him may expel him, *ante*, p. 283.

Miscellaneous instruments.

Conveyances by a retiring partner of his share in freeholds or leaseholds to a continuing partner, deeds of indemnity by continuing partners to retiring partners, and deeds of covenant by continuing partners to secure the capital of a deceased partner lent to the firm during a term pursuant to provisions in the articles of partnership, require no discussion.

Loan bearing interest varying with profits.

Reference should be made to the Partnership Act, 1890, s. 2, sub-s. (3) *d*, and s. 3, re-enacting Bovill's Act (28 & 29 Vict. c. 86), viz. :—

S. 2, sub-s. (3) *d*. "The advance of money by way of loan to a person engaged or about to engage in any business (*u*) on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall

(*u*) By s. 45, "business" includes every trade, occupation, or profession.

receive a share of the profits (*x*) arising from carrying on the business, does not, of itself, make the lender a partner with the person or persons carrying on the business, or liable as such. Provided that the contract is in writing and signed by or on behalf of all the parties thereto."

S. 3. "In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied."

In cases not falling within the Act of 1890 or the repealed Act, the rule was formerly supposed to be that persons who participate in the profits of the business are, in the absence of other circumstances, partners; and therefore that an agreement to share profits standing alone constituted a partnership, though it was held that other circumstances might rebut this presumption, and show that the person or some of the persons who participate in the profits were not intended to be partners (*y*). But the true rule is now considered to be that participation in profits, though strong evidence, is not conclusive evidence of a partnership; and that the question of partnership must be decided by the intention of the parties, which is to be ascertained from the contents of the written instruments, if any, and the conduct of the parties (*z*).

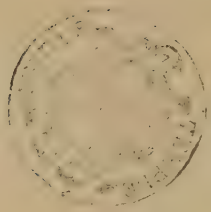
(*x*) This includes a fixed sum to be received "out of the profits;" *In re Young* (1896), 2 Q. B. 484.

(*y*) *Cox* v. *Hickman*, 8 H. L. C. 268; *Pawsey* v. *Armstrong*, 18 Ch. D. 698; *Walker* v. *Hirsch*, 27 Ch. D. 460.

(*z*) *Badeley* v. *Consolidated Bank*,

In the case of a loan made in pursuance of Bovill's Act, or of the Partnership Act, 1890, the agreement to receive a rate of interest varying with profits, or a share of the profits instead of interest, standing alone, does not render the person advancing the money a partner with the trader to whom it is lent; though the other facts of the case may be sufficient to render the person advancing the money a partner. It should be noticed that a statement that the advance is expressed to be by way of loan under the provisions of the Act, or a statement that a partnership is not intended to be constituted, is not sufficient to prevent the person advancing the money from becoming a partner, if the other facts of the case would render him a partner (Lindley, Partn. 45), and therefore being useless, should be omitted. It is impossible in an elementary treatise to discuss what circumstances are sufficient, where an advance purports to be made under the provisions of the Act, to render the person advancing the money a partner; but it is conceived that the mere fact of a trader agreeing on the occasion of a loan to allow the person advancing the money to join in taking the annual accounts by which the profits are ascertained, will not render the latter a partner, and that probably an agreement enabling the latter to forbid the trader from doing certain acts in the course of his business will not render him a partner; but that on the other hand if he has power to compel the trader to do certain acts in his business or even to carry on his business, he becomes a partner. (*Mollwo, March & Co.* v. *The Court of Wards*, L. R. 4 P. C. 419; *Pooley* v. *Driver*, 5 Ch. D. 458; *Ex parte Tennant*, 6 Ch. D. 303; *Ex parte Delhasse*, 7 Ch. D. 511; *Badeley* v. *Consolidated Bank*, 38 Ch. D. 238.)

38 Ch. D. 238 (see pp. 247, 258, 262). Lindley, L.J. (Partn. 57), considers the law to be that "no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*, or unless they are his agents."



# CHAPTER XI.

## MARRIAGE SETTLEMENTS.

BEFORE we proceed to discuss settlements on marriage it will be convenient, at the risk of repetition, to state shortly how the wife's property can be dealt with, and what interest her husband takes in it in the absence of a settlement.

Wife married and title accruing before 1883.

*First.* Where the wife was married and her title accrued before 1883 (*a*).

*As to property not belonging to her as her separate estate, either expressly or under the M. W. P. A.* 1870 (discussed *ante*, p. 136 *et seq.*).

Freeholds.

The husband becomes entitled on marriage to the rents and profits of her freeholds during the joint lives of himself and his wife (M. L. R. P. 122), whether her estate in the lands is legal or equitable; and he can convey his interest in the rents and profits without her concurrence. (*Robertson* v. *Norris*, 11 Q. B. 916.) On the birth of issue who may by any possibility inherit he becomes entitled, as tenant by the curtesy, to her freeholds of inheritance during his own life whether her interest is legal or equitable (M. L. R. P. 141; *Cooper* v. *Macdonald*, 7 Ch. D. 288); subject to the qualifications that, if the wife takes by descent, the husband must acquire seisin during her life (Co. Lit. 29 *a*); and that, as to gavelkind land, he becomes tenant by the curtesy of one moiety only, but that he is entitled to the curtesy estate whether issue capable of inheriting is born or not,

(*a*) See M. W. P. A. 1882 (45 & 46 Vict. c. 75), s. 5. *Re Harris' Settled Estates*, 28 Ch. D. 171. *Re Cuno*, 43 Ch. D. 12; M. L. R. P. 121 *et seq.*; M. L. P. P. 384 *et seq.*

and that his estate is subject to cesser on his marrying again (Co. Lit. 30 *a*, note). The husband and wife together can convey her freeholds, or any interest therein, whether legal or equitable, whether in possession or remainder, and whether vested or contingent, by deed acknowledged under the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74, s. 77), as modified by the C. A. 1882, s. 7 (*b*). The interest of the husband in his wife's copyholds depends upon the custom of the manor. Generally he takes an interest analogous to that which he takes in her freeholds. (See M. L. R. P. 327.) The husband and wife can together convey her legal or equitable interest in copyholds (3 & 4 Will. 4, c. 74, ss. 77, 90) by a surrender made by both and taken on the separate examination of the wife by the steward, subject in some manors to variations of the custom. The wife's equitable interest in copyholds can be conveyed also by the husband and wife together by deed acknowledged by the wife (s. 77).

Copyholds.

The wife's interest in money subject to an absolute trust for investment in land (3 & 4 Will. 4, c. 74, s. 77), her reversionary interest in the proceeds of real estate subject to an absolute trust for sale (*May* v. *Roper*, 4 Sim. 360), and her equitable reversionary life interest in a sum of money properly invested upon a mortgage of land (*Miller* v. *Collins* (1896), 1 Ch. 573), can be conveyed by deed acknowledged.

Money to be laid out in and proceeds of sale of real estate.

The wife's chattels real to which she is entitled in her own right (*i.e.*, not as executrix or trustee), whether her interest is legal or equitable, vest in her husband *sub modo*. He can absolutely dispose of them; and that, even if her interest is reversionary (*c*), unless it be of such a nature that

Chattels real.

(*b*) See Shelford, R. P. Stat. 292, *ante*, p. 136. If the wife, on being examined by the Commissioners, states that she intends to give up her interest in the property without having any provision made for her, the purchase-money becomes the absolute property of the husband, even if it is not reduced into possession by him. *Tennent* v. *Welch*, 37 Ch. D. 622.

(*c*) *Re Bellamy*, 25 Ch. D. 620.

it cannot by any possibility vest in her during the coverture (*Duberley* v. *Day*, 16 Beav. 33); but, if he charges them, the charge does not bind the wife if she survives him. He is entitled to the rents and profits of her chattels real during the joint lives of himself and his wife; but he cannot dispose of them by his will. If he survives his wife, they belong to him by survivorship without taking out administration to her (*d*), and if he dies in the wife's lifetime without having disposed of them by act *inter vivos*, they vest absolutely in the wife. (See M. L. P. P. 388; Co. Lit. 351 *a*; *ante* p. 138.)

Chattels personal.

The wife's chattels personal to which she is entitled in her own right in possession vest absolutely in the husband on the marriage. (M. L. P. P. 384; Co. Lit. 351 *b*.)

Choses in action (*e*).

If the husband reduces her choses in action into possession (*ante*, p. 200) during the coverture, they belong to him; if he does not, and the wife survives, they remain her property. If the husband survives, they become his property on his taking out administration to her. (See *Smart* v. *Tranter*, 43 Ch. D. 587.) The Married Women's Reversionary Interests Act, 1857, commonly known as "Malins' Act" (20 & 21 Vict. c. 57; see *ante*, p. 203) provided that after 1857, a married woman might by deed acknowledged, with the concurrence of her husband, dispose of reversionary interests in personal estate to which she became entitled under any instrument made after 1857, unless by such instrument she was restrained from alienating or affecting the interest; but the Act (see s. 4) does not extend to interests in personal estate settled on her by her marriage settlement. Before this Act there was no means whereby a married woman could, either alone or with the

But if her interest is equitable, his assignment does not displace her equity to a settlement (Dart, V. & P. 10; *Hanson* v. *Keating*, 4 Ha. 1).

(*d*) *Re Bellamy*, 25 Ch. D. 620; *Surman* v. *Wharton* (1891), 1 Q. B. 491.

(*e*) See on a wife's choses in action the judgment of Sir T. Plumer, M. R., in *Purdew* v. *Jackson*, 1 Russ. at p. 66.

concurrence of her husband, dispose of her reversionary choses in action; and, even after the Act, she could not dispose of a reversionary chose in action to which she was entitled under her marriage settlement, not for her separate use.

Separate estate.

*As to property which is her separate estate, either by express declaration or the M. W. P. A.* 1870 (*f*).

Wife entitled in Equity as *feme sole.*

The husband takes during the wife's lifetime no equitable interest in property which is her separate estate; and she can dispose of her equitable interest in such property either by act *inter vivos*, or by will, exactly as if she were a *feme sole*; but, where a legal interest is vested in a trustee for the wife, it must be conveyed by him; and where, by reason of there being no express trustee, it is vested in the husband, it must be conveyed by him, or by him and his wife, exactly in the same manner as if the property belonged to the wife, but did not form part of her separate estate (*g*).

Legal estate.

Interest of husband surviving.

The interests of the husband after the wife's death in her separate estate as to which she dies intestate are the following, and they have not been affected by the M. W. P. A. 1882 (*Re Lambert*, 39 Ch. D. 626):—He is tenant by the curtesy of her freeholds of inheritance in those cases in which he would have been tenant by the curtesy if there had been no separate use (*Cooper* v. *Macdonald*, 7 Ch. D. 288; *Eager* v. *Furnivall*, 17 Ch. D. 115); he is entitled to her leaseholds by survivorship (*Archer* v. *Lavender*, 9 Ir. R. Eq. 220); to her personal chattels, *jure mariti* (*Bird* v. *Peagrum*, 13 C. B. 639; *Molony* v. *Kennedy*, 10 Sim. 254; *Johnstone* v. *Lumb*, 15 Sim. 308), and to her choses in action on taking out administration to her (*Proudley* v. *Fielder*, 2 Myl. & K. 57).

Married Women's Property Act, 1870.

Property constituted the wife's separate estate by the M. W. P. A. 1870 (which was repealed by the M. W. P. A.

(*f*) Presents given to a married woman in contemplation of marriage are her separate property. *Re Jamieson*, 37 W. R. 464.

(*g*) M. L. R. P. 126; M. L. P. P. 389.

1882, but so as not to affect any right acquired while the Act was in force), consisted (M. L. P. P. 392 *et seq.*) of her earnings in any occupation that she carried on separately from her husband or derived from the exercise of any literary, artistic, or scientific skill, and the investments thereof; investments made in a specified manner in the savings banks, public stocks or funds, joint stock companies, and friendly societies, all of which investments she was authorised to transfer as a *feme sole*; and also, if she was married after the 9th of August, 1870, personalty to which she became entitled during marriage as next of kin, or one of the next of kin, of an intestate (*Re Voss*, 13 Ch. D. 504), or any sum of money not exceeding £200 to which she became entitled during marriage under a deed or will, and also the rents and profits of freeholds, copyholds, or customary-hold property descending on her as the heiress or one of the co-heiresses of an intestate (see *ante*, p. 138). It will be observed that the Act only dealt with the equitable interest, and put the wife into the same position as if the property constituted her separate estate by the Act had been constituted her separate estate by contract (*h*).

Wife married or title accruing after 1882.

*Secondly*, where the wife was married after 1882; or was married before 1883, but her title accrued after 1882.

By the M. W. P. A. 1882, the wife is, for the purpose "of acquiring, holding, and disposing by will or otherwise of" property, put into the position of a *feme sole*, so that the husband's common law rights are altogether excluded during the coverture, and the wife can deal with the legal as well as the equitable interests in property without his concurrence; but the Act does not deprive the husband after her death (subject to any disposition that she may make by will) of the same rights over her property as he would have had over property settled to her separate use if the marriage had taken place and the property had been acquired by her before 1883.

(*h*) See *Re Poole's Estate*, 6 Ch. D. 739; *Weldon* v. *De Bathe*, 14 Q. B. D. at p. 344; *Johnson* v. *Johnson*, 35 Ch. D. 345.

A will made by a married woman by virtue of the power conferred on her by the Act was rendered inoperative by her husband's death (*Re Price*, 28 Ch. D. 709); but this has been altered by the M. W. P. A. 1893 (56 & 57 Vict. c. 63), s. 3 (*i*).

The M. W. P. A. 1882 (*j*) is not (s. 19) "to interfere with or affect any settlement, or agreement for a settlement, made or to be made, whether before or after marriage, respecting the property of any married woman." It has been held that the meaning of this section is that the Act is "not to invalidate or render inoperative any settlement" (*Re Armstrong*, 21 Q. B. D. 270); that the section "excepts from the Act everything which would interfere with the settlement and would prevent the covenants contained in it from having operation" (*Hancock* v. *Hancock*, 38 Ch. D. at p. 89; see also *Stevens* v. *Trevor-Garrick* (1893), 2 Ch. 307). The effect of these decisions appears to be that every settlement or agreement for a settlement of the property of a married woman is to be construed and take effect exactly in the same manner as if the Act had not been passed, except that the wife's interests under the settlement (whether in income or capital) are her separate estate whether expressed to be such by the terms of the settlement or not (*Re Lumley* (1896), 2 Ch. 690); but property not expressly given to her for her separate use is not made her separate estate by the Act if the effect would be to prevent it being bound by the settlement.

### PART I.—SETTLEMENTS OF PERSONALTY.

Analysis.

The following is the usual arrangement of the clauses of a settlement of personalty; but the arrangement sometimes differs slightly from that here given, the principal variations being in the place of the investment clause. The clauses printed in italics are now generally omitted, in reliance on recent legislation.

1. Parties.
2. Recitals.

(*i*) This Act is printed in M. L. R. P., p. 545.

(*j*) This Act is printed in M. L. R. P., p. 536.

3. Conveyance of property by intended husband "as settlor" to the trustees, habendum to the trustees in trust for him until the marriage, and afterwards upon the trusts thereinafter declared.
4. Similar conveyance by intended wife.
5. *Covenants for title* (*k*).
6. Declaration of trusts after marriage, *i.e.*:—
   - (i.) Trusts for investment, with power to vary securities.
   - (ii.) Trusts for payment of income of property settled by or on behalf of the intended husband.
   - (iii.) Trusts for payment of income of property settled by or on behalf of the intended wife.
   - (iv.) Trusts for the issue of the marriage.
   - (v.) Ultimate trusts of property.
7. Miscellaneous clauses, such as a covenant by husband's father to pay an annuity.
8. Power to invest in the purchase of land.
9. Covenant to settle after-acquired property of the intended wife.
10. Power to apportion blended trust funds.
11. *The receipt clause* (*l*).
12. Power to determine questions *and to arrange and compromise* (*m*).
13. *Power to appoint new trustees* (*n*).
14. *Indemnity and reimbursement clause* (*o*).

(*k*) See C. A. 1881, s. 7; *ante*, p. 105, *post*, p. 310.

(*l*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20; re-enacting C. A. 1881, s. 36. Occasionally the receipt clause was omitted before 1882 in reliance on the powers to give receipts contained in the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 23, and Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 29.

(*m*) Trustee Act, 1893, s. 21, re-enacting C. A. 1881, s. 37, and re-enacting and extending the provisions of 23 & 24 Vict. c. 145, s. 30.

(*n*) Trustee Act, 1893, s. 10, re-enacting C. A. 1881, s. 31; C. A. 1882, s. 5, as amended by C. A. 1892, s. 6.

(*o*) Trustee Act, 1893, s. 8 (2)(3), and s. 24, re-enacting C. A. 1881, s. 37; 22 & 23 Vict. c. 35, s. 31.

Sometimes the trust for investment, with power to vary securities, immediately precedes the power to invest in land.

Till lately it was the practice to insert after the assignment full covenants for title by the settlors, and covenants against incumbrances by parties conveying in a fiduciary capacity: but these are now generally omitted and appropriate covenants implied by the use of the words provided in s. 7 of the C. A. 1881. It was also the practice to insert at the end of the deed a trustees' receipt clause, a power to the trustees to arrange and compromise, a full power of appointing new trustees, and full provisions for the indemnity and reimbursement of trustees; but these clauses are now generally omitted, in reliance on the statutory provisions. In some few cases, which will be discussed subsequently, it may still be advisable to insert them, or to insert clauses supplementary to the statutory provisions.

It will be convenient, instead of considering the clauses in the order in which they occur, to divide them into the classes following:—

*First.* Those having reference to the conveyance of the settled property, and to its preservation and management.

*Second.* Those stating the interests taken by the husband and wife respectively.

*Third.* Those stating the interests taken by the issue of the marriage.

*Fourth.* Those stating the ultimate destination of the property on the failure of the persons primarily intended to be provided for; *i.e.*, of husband, wife, and issue.

*Fifth.* The trustee clauses.

### *Clauses of the First Class.*

These may be subdivided as follows:— Subdivisions of first class.

(*a.*) The clauses, if any, by which the property is conveyed to the trustees.

(*b.*) The clauses authorising investments, sales, and re-investments, of the trust property; and the power to give receipts.

(*c.*) The power to apportion blended funds.

(*d.*) The power to determine questions and to arrange and compromise.

The assignment to the trustees.

When the property is transferred by delivery or in a statutory form.

(*a.*) When the property to be vested in the trustees consists of money or other personal chattels which pass by delivery; property, such as consols, which can be transferred in some statutory manner; or such as railway debentures, which are properly assigned by deed in statutory form, it is transferred to the trustees in the appropriate manner. Inasmuch as it is not intended to transfer the beneficial ownership in the property unless the marriage takes place, the recitals in the settlement state the payment or transfer to the trustees as having been made, or being about to be made pursuant to an agreement made on the treaty for the marriage "upon trust for the said [*settlor*] until the said intended marriage, and afterwards upon the trusts hereinafter expressed concerning the same." For forms of recitals see 2 K. & E., pp. 452, 453.

When the assignment should not be contained in the settlement.

But in cases where the proper method of conveying the property is by a deed in the ordinary form, the question arises, whether the conveyance should be contained in the settlement itself, or should be carried into effect by a separate deed. Where the property consists of furniture, or other movable chattels, passing by delivery, and it is desirable not to transfer the ownership to the trustees by delivery only, but to employ a bill of sale (which will not require registration as the settlement is made on marriage; see the Bills of Sale Act, 1878, s. 4), it does not signify whether the settlement itself is the bill of sale or not; for on any sale of the furniture by the trustees, the bill of sale will not be a document of title as regards the purchaser. But where the property is of such a nature that every instrument of conveyance is a necessary link in the title, the answer to the question above proposed appears to depend upon whether the property may have to be parted with in the exercise of the trusts of the settlement or not; for, in the former case, inconvenience would arise if the settlement

were to become one of the title-deeds of the property. Thus, where land is settled by trust for sale, such land should be conveyed to the trustees by a separate deed: see p. 311.

Transfer of mortgage to trustees.

Again, if a mortgage is to be transferred to the trustees, the transfer ought to be effected by a separate deed (*Capper* v. *Terrington*, 1 Coll. 103; *Dobson* v. *Land*, 4 De G. & S. 575); for otherwise, if the mortgage is paid off, the settlement becomes one of the title-deeds of the mortgagor. The transfer of the mortgage to the trustees is in the usual form, with the following exceptions (see form in 2 K. & E. 529): it contains a recital of the intended marriage and of the agreement upon the treaty for the marriage for the transfer of the mortgage to the trustees, "in manner and upon the trusts hereinafter expressed;" the transfer is made "in pursuance of the said agreement, and in consideration of the said intended marriage," by the transferor "as settlor, with the approbation of [*the intended husband and wife*]," or, if one of them was the transferor, with the approbation of the other: the habendum of the mortgage debt is, "to the said A. B. and C. D." (*the trustees*) ["their executors, administrators, and assigns" (*p*)], in trust for the transferor, "until the said intended marriage, and afterwards upon such trusts, and with and subject to such powers and provisions, as are declared concerning the same by an indenture" (*meaning the settlement*) "intended to bear even date with and to be executed after these presents, and made, &c." Formerly a power to the trustees to give receipts for the mortgage money, a power of appointing new trustees, and the trustees' indemnity clause were inserted. The first and second of these clauses gradually fell into disuse owing to the provisions of Lord Cranworth's Act (23 & 24 Vict. c. 145), and were always omitted after 1881, in reliance on the provisions of the C. A. 1881, ss. 31, 36 (repealed by the Trustee Act, 1893, and re-enacted by ss. 20, 10); but it is still the practice to insert a short clause, stating by whom the statutory power of appointing

(*p*) These words are now generally omitted.

new trustees is to be exercised. The indemnity clause was omitted in reliance on the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 31 (repealed by the Trustee Act, 1893, and re-enacted by s. 24).

The settlement recites the mortgage; or, if it has been dealt with since it was made, recites that the settlor "is entitled to a mortgage debt of £—— secured, together with interest at the rate of £——, on hereditaments at ——, by an indenture, dated, &c." The contemporaneous deed of transfer is also recited (see form in 2 K. & E. 530).

Where the settled property is not to be disposed of.

On the other hand, suppose that the property conveyed is not intended to be disposed of by the trustees; as, for instance, where the property conveyed by the intended wife is her reversionary interest, expectant on her father's death, in the funds comprised in his settlement. Here the trustees are not intended to deal with the reversionary interest until it becomes payable, and there is no objection to the assignment to the trustees being made in the settlement itself.

Covenants for title.

There was formerly some difference of opinion as to what covenants for title should be inserted where the assignment was contained in the settlement itself. Most practitioners before 1882 inserted in a conveyance of land, or a policy of life assurance, the same covenants as would have been inserted in a conveyance on a sale; and, in all other cases, a covenant by the husband for further assurance of property assigned by him, and separate covenants by the husband and wife for further assurance of property assigned by her. The practice, however, of giving full covenants for title led occasionally to most disastrous consequences. For it might happen that some incumbrance was overlooked on the investigation of the title; and on the incumbrancer enforcing his rights, it became the duty of the trustees to sue the settlor on his covenants—a course which might lead to his ruin, and was not for the benefit of his wife and children. It is, therefore, a wiser course never to insert any covenant except a covenant by the conveying party for further assurance,

which may be express, or, as is now the practice, may be implied by making him convey "as settlor."

The C. A. 1881, provides, s. 7 (1) (E), that "in a conveyance by way of settlement," which, it will be observed is not restricted to settlements for value, "every person who conveys and is expressed to convey as settlor," shall be deemed to covenant for further assurance: the covenant extending to the acts of every person claiming under the person so conveying either by deed or act or operation of law in his lifetime subsequent to the conveyance, or by testamentary disposition, or by devolution in law on his death.

Where the settlement is made for valuable consideration, as in the case of a marriage settlement, full covenants for title and further assurance may be implied by making the settlor convey "as beneficial owner" (*ante*, p. 105).

Land settled by trust for sale.

Occasionally land is put into settlement, with the intention that it should ultimately be divided among the children of the marriage. Here the proper scheme is not to settle the land itself, but to vest it in trustees for sale and to settle the proceeds of the sale. This artifice allows us to make use of the ordinary clauses and provisions of a settlement of personalty. The land is assured, usually by separate deed (see *ante*, p. 308), to the trustees of the settlement, upon trust for the settlor "until the said intended marriage and afterwards" (or, if the land be of freehold tenure, it may be assured "to the use of the said [*settlor*] and his heirs until the said intended marriage, and afterwards to the use of the said [*trustees*] and their heirs") "upon trust, that they, the said [*trustees*] [or the survivors or survivor of them, or the executors or administrators of such survivor,] or other the trustees or trustee for the time being of these presents, shall, at the request, in writing, of [*the intended husband and wife*], during their joint lives, and afterwards of the survivor of them during his or her life, and after the death of the survivor at the discretion of the trustees or trustee for the time being, sell" (see form,

2 K. & E. 542); the trusts of the proceeds being declared by reference to the marriage settlement (see *infra*). Under this scheme the land cannot be sold against the wishes of the husband and wife, so that they will as certainly enjoy it as if it had been settled *in specie;* while, on the other hand, when the property has to be divided, a partition of the land is avoided unless all the children desire it; for any one child has a right to insist on a sale. The words, "or the survivors or survivor of them," though usually inserted, may be omitted in reliance on the Trustee Act, 1893, s. 22, re-enacting the C. A. 1881, s. 38 (see *post*, p. 322); if they are omitted, the reference to the executors, &c., will also be omitted. Formerly it was the practice to expressly authorise the trustees to sell, either together or in parcels, by public auction or private contract, and subject to such conditions as they should think fit, and to buy in, or rescind or vary any contract for sale; but these express authorities are now omitted in reliance on the provisions of the Trustee Act, 1893, s. 13, re-enacting the C. A. 1881, s. 35, which confers these powers on trustees for sale, unless a contrary intention is expressed in the settlement.

Trusts of proceeds of sale, and of rents till sale.

It is the practice to declare in the deed containing the trusts for sale that the trustees shall hold the net sale moneys, and also the rents and profits until sale, upon the trusts declared, "by an indenture already prepared and intended to bear even date with, and to be executed immediately after these presents, and to be made between, &c.," meaning the settlement; while the beneficial trusts of the sale moneys, and of the rents and profits (which latter are declared by reference to the trusts of the income of the investments of the sale moneys) are contained in the settlement (see form in 2 K. & E. 545). This is convenient, for after all the property is sold, the deed containing the trust for sale, being no longer of any use to the trustees, can be handed over to the purchaser, who is not concerned to see the deed containing the beneficial trusts.

Powers of manage-

In many cases it is proper, in the prudent management

ment in conveyance in trust for sale.

of an estate, to commit waste by cutting timber, or opening mines and quarries; and although the trustees of a conveyance in trust for sale are the legal owners of the fee simple, and therefore may at law commit waste, it appears that in Equity they have no power to do so, unless it be for the benefit of all their *cestuis que trustent*. It would follow that, whenever it became proper to cut a tree, they would be bound to sell it and invest the proceeds (see *post*, p. 371, as to the power given by the S. L. A. to a tenant for life to cut timber). The rule is extremely inconvenient; for, if rigorously carried out, it would render it necessary for the trustees to interfere in the management of the estate. It also may be proper to insure or to improve the estate by building, making roads, &c.; but if this be done, the question arises whether the expenses are to be paid out of the trust property; and if so, whether they are to be paid out of capital or income. Various schemes have been proposed for avoiding these difficulties. One scheme is to make the person entitled to the receipt of the rents and profits legal tenant for life, without impeachment of waste; but to declare that if a sale be made in his lifetime, the property shall be sold with possession. The disadvantage of this scheme is that, on the bankruptcy of the tenant for life, the power of committing waste would be exercised for the benefit of the creditors, not of the persons claiming under the settlement, and that no provision is made for insurance or improvements on the property. The better plan appears to be to insert a short clause giving to the trustees general powers of management, of committing waste, of insuring and improving the property, with power to delegate these powers to the person entitled to the rents and profits (see form in 2 K. & E. 496). The result, according to the proposed scheme, is, that so long as things go on well, the husband, whether he or his wife takes the first life interest, manages the property as if he were absolute owner; while, if he gets into difficulties, the trustees manage it themselves. The trustees should also have power

to determine what part of the produce, timber, &c., is to be considered as capital and what is income, and to raise the costs of insurance and improvements out of income, or, to a limited extent, out of capital.

Powers of leasing.

It was formerly the practice to give to the trustees express powers of leasing the property exercisable until sale. This practice was interfered with by the S. L. A. 1882 (s. 63), which required the consent of the tenant for life of the proceeds of sale; but, as the effect of the S. L. A. 1884 (ss. 6 and 7) is to enable these powers to be exercised without the consent of the tenant for life, unless he has obtained an order of Court authorising him to exercise the statutory powers (in which case the trustees' powers are suspended), express powers of leasing are now commonly given to the trustees (see form in 2 K. & E. 498). Sometimes the power is restricted to granting leases for twenty-one years; but more commonly the powers are given by reference to the statutory powers, so as to enable the grant by the trustees of any lease which a tenant for life could grant by virtue of the S. L. Acts, 1882 to 1890 (see form in 2 K. & E. 501).

It is perhaps usual to give the powers to the trustees, to be exercised with the consent of the husband and wife and of the survivor, and after the death of the survivor at the discretion of the trustees; but they are often given to the equitable tenant for life, for the following reasons:—

*First*, it is not generally wished that the trustees should interfere in arranging the terms of the tenancies, as the interests of the children are sufficiently protected by the terms of the statutory or ordinary express powers; and although, according to the usual practice, the trustees may think fit to grant a lease under an express power vested in them on the representation of the tenant for life that the lease is advantageous, they incur responsibility by doing so without satisfying themselves by independent inquiry as to the propriety of the lease; *Second*, as trustees do not generally live near the property, it would be necessary for them, if they were themselves to arrange the terms of the

tenancies, or even to make inquiries whether a lease approved of by the tenant for life was a proper one, either themselves to journey to the property or to employ an agent to view it, either of which courses would lead to expense; *Third*, it is very inconvenient to obtain the execution of the lease by many people. If, as is often the case, there are four trustees, and the lease is made under an express power given to them to be exercised with the consent of the husband and wife, six persons have to execute the lease; while if the power is vested in the tenant for life, he alone need execute the lease.

Where the tenant for life, whether legal or equitable, grants a lease of freeholds under an express power, the lease operates as a declaration of the use, so that the lessee obtains the legal estate by force of the Statute of Uses. But, if the lease be made of copyholds or leaseholds for years, the Statute of Uses does not apply, and the lease does not pass the legal estate. In cases of leases for short terms at rack-rent this is immaterial, for the lessee does not investigate his lessor's title, and he is perfectly safe, as the lessor himself is bound by the estoppel caused by the lease, and the other persons claiming under the settlement are bound in equity. If, however, the power extends to granting building or mining leases, it may be desirable to insert a provision binding the trustees to concur in any lease granted by the tenant for life, or to make a demise for the purpose of confirming it (see the form, 2 K. & E. 498, n.)

Wife's after-acquired property.

It is the practice to insert a covenant to settle any property which may be acquired by the wife during the coverture. Occasionally, when the covenant is improperly framed, it extends in terms to all the property acquired by the wife, both during her husband's lifetime and after his death. The tendency of the Courts, where the expressions are ambiguous, is to construe the covenant as applying only to property acquired during the husband's lifetime (*q*).

(*q*) *Re Edwards*, L. R. 9 Ch. 97, approving *Dickinson* v. *Dillwyn*, L. R. 8 Eq. 546; *Carter* v. *Carter*, L. R. 8 Eq. 551; *Re Coghlan* (1894), 3 Ch. 76; Interp. 510, Rule 178.

Regard being had to the decisions on the 19th section of the M. W. P. A. 1882 (*ante*, p. 305), it appears safer to frame the clause so as to bind any interests that the husband would have taken in the wife's property if the Act had not passed. This may be effected by making both husband and wife covenant; but the usual plan is to frame the clause as an agreement and declaration that the wife's property shall be settled, in which case it operates as a covenant by both husband and wife (*ante*, p. 152; *Ramsden* v. *Smith*, 2 Drew. 298; see p. 309). Before 1883 the clause was of special importance as binding the interests which the husband took in the wife's property, not only after her death but in her lifetime; but, owing to the provisions of the M. W. P. A. 1882, where the marriage is after 1882, the husband takes no interest during the wife's life in her property, and the interest that he takes after her death is subject to her testamentary dispositions (see the nature of the husband's interests in the wife's property discussed, *ante*, p. 300 *et seq*). It follows that before 1883, the insertion of the covenant was to the wife's advantage rather than the husband's, but since 1882 it is for the benefit of both, for, on the one hand, it protects the wife from pressure by the husband to give her after-acquired property to him; and, on the other hand, it renders it certain, if so intended, that he will at least take a life interest in it.

The questions that arise on the construction of the covenant are difficult, and are therefore not discussed here (*r*). The clause itself may be divided into the following sub-clauses:—

(*a*). A description of what is to be settled. This is generally stated to be—(1) any property to which the intended wife "shall at the time of the intended marriage be" entitled (*s*); (2) any property which during the coverture

(*r*) See Interp. ch. xxxi.

(*s*) Where the wife is known to be absolutely entitled to property which is intended to be settled, the settlement should be effected by the principal part of the deed, and not left to take effect under this clause. Having regard to the

she (and in settlements before 1883 any property which during the coverture the husband in her right) becomes seised or possessed of, or entitled to, at the same time and from the same source (*t*), of more than a minimum value (often £200); except furniture, jewels, plate, &c., which excepted articles are to remain the absolute property of the wife, or (in settlements before 1883) are to belong to her for her separate use, and except any annuity or other estate or interest for the life or any part of the life of the wife, which it is declared shall belong to the wife for her separate use, and during the coverture, without power of anticipation; (3) property over which the wife has or acquires a general power of appointment, and (in settlements before 1883) property to which the wife is entitled for her separate use, is sometimes included, owing to the risk that, if this be not done, the wife might be persuaded to exercise the power in favour of her husband, or to give the property settled to her separate use to him; but, as a person giving property in either of these manners to the wife will probably be aware of the risk referred to, and may possibly consider that, in the events that have happened, it is for the benefit of the family that the property should not be bound by the covenant, the expediency of comprising property of this nature is doubtful. Property which would in the absence of a marriage settlement be the wife's separate estate by virtue of the M. W. P. A. 1882, is not property to which she becomes entitled for her separate use for the purposes of the covenant to settle; for the effect of s. 19 of the Act is

language of the Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I., imposing an *ad valorem* duty on the settlement "of any definite and certain principal sum of money," it appears desirable not to covenant to settle "property to which the wife is now," *i.e.*, at the date of the settlement, "entitled," for this might subject the settlement to additional duty if such property in fact existed, but to confine the covenant to property to which the wife shall be entitled at the date of the marriage or shall acquire during the coverture.

(*t*) See *Re Davies* (1897), 2 Ch. 204. The covenant does not bind accumulations of income. *Finlay* v. *Darling* (1897), 1 Ch, 719.

that the operation of the statute is excluded so far as it would prevent the inclusion of such property in the settlement (*Re Stonor*, 24 Ch. D. 195; *Re Whitaker*, 34 Ch. D. 227; *Hancock* v. *Hancock*, 38 Ch. D. 78; *Stevens* v. *Trevor-Garrick* (1893), 2 Ch. 307).

It will be observed that, if the covenant is in the form above suggested, it will be impossible for the wife to retain for her own use any property acquired by her during the coverture, however strongly the donor may have expressed a wish that she should retain it (*Scholfield* v. *Spooner*, 26 Ch. D. 94). This is sometimes very inconvenient. The wife may have attained such an age as to render it certain that there will be no issue of the marriage, and circumstances may occur which would render the employment of a capital sum of the greatest advantage to the wife. To meet this difficulty, "property as to which, in the instrument under which it is acquired by the said [*wife*], an intention is expressed that it should not be bound by a provision of the nature of this covenant" is sometimes excepted from the operation of the covenant (see 2 K. & E. 507).

($\beta$). A direction that the property shall be conveyed to the trustees at the cost of the trust estate.

($\gamma$). Trusts for sale and conversion, exercisable with the consent of the husband and wife and the survivor, and afterwards at the discretion of the trustees, over all the property.

($\delta$). The trusts of the proceeds of conversion are declared by reference to the trusts declared in the settlement concerning the wife's property. If the whole of the property previously settled belongs to the husband, the trusts will be declared by reference to it, with some modifications.

($\epsilon$). It is very commonly and properly declared that, if there be not more than a specified number of children of the intended marriage (or sometimes, where the property settled is large, without reference to the number of children), the wife shall have power to appoint a life interest in her after-acquired property to any future husband, and that her

children by any future marriage shall take some interest in the fund. Where all her present and after-acquired property is settled, it is perhaps a better plan to give her a general power, in the event of her surviving her husband, and there being only a specified number of children who attain vested interests, to withdraw a specified part of the property from the settlement. A similar power is often given to the husband as to his fortune (see forms in 2 K. & E. 509, 512).

Power to withdraw property from

Where neither husband nor wife can settle any property in possession, but only property subject to prior life interests, it may be necessary to provide an immediate income for them; or, if that is unnecessary, as, for instance, where the husband has a sufficient professional income, still some provision should be made for the case of his death before the settled funds fall into possession. This is usually done by means of an agreement by some relation of the husband or of the wife to pay an annuity until that event.

Annuity.

Where, for example, the husband settles a reversion to which he is entitled under his father's settlement subject to his father's life interest, the usual course is for the father to covenant to pay an annuity, which may be charged on his life interest under that settlement. The annuity is made payable during the joint lives of the husband and his father, and occasionally, in case of the death of the husband in the father's lifetime, during the remainder of the life of the father, if and so long as the wife or any issue of the marriage are living; or it may be made payable only while some issue of the marriage are living; or it may be made determinable on the marriage of the son's widow.

The covenant should usually be entered into with the trustees of the settlement, and the trusts of the annuity may generally be declared by reference to those of the income of the settled property (see Form 1, 2 K. & E. 491). The annuity should be made payable quarterly or half-yearly, and

till lately it was necessary to declare expressly that it should accrue from day to day. The words "accrue from day to day" require some explanation. The general intention is to provide for the payment of the annuity during an uncertain period, for instance, until the husband's father dies, or until the husband attains a certain rank in the army, or the like. It is very unlikely that that period will happen to end on one of the days on which the annuity is payable, and it becomes, therefore, necessary to provide for the payment of a proportional part of the annuity up to the day of the happening of the event on which it determines. There are two methods of doing this. By the one method we provide for the payment of a certain annuity, say £100, by equal quarterly payments of £25 each, so long as, *e.g.*, the father is alive, and direct that on the quarter-day next after his death a further payment shall be made proportional in amount to the number of days that he survives the preceding quarter-day. By the other method, that referred to above, we cause a proportional part of the annuity to become a debt daily, but not to be payable till the following quarter-day, which it will be observed, comes to exactly the same thing, but is a more convenient method of expression. The effect of the 1st and 2nd sections of the Apportionment Act, 1870 (33 & 34 Vict. c. 35), is to obviate the necessity for expressly stating that the annuity is to accrue from day to day; but, as the words employed are very few ("to be considered as accruing from day to day"), it is the practice to insert them.

Sometimes it is intended that the annuity shall vary in amount according to circumstances which may arise. In this case it will generally be found convenient to insert a covenant for the payment of the full amount, followed by provisoes qualifying the original covenant.

Life insurance.

Sometimes where the husband has no property that can conveniently be settled, he has an income derived from his business or profession. In this case he generally insures his life and settles the policy and the money insured. He

may effect the insurance either in the names of the trustees or in his own name. In the latter case he must assign the policy to the trustees; and the assignment may conveniently be made in the settlement itself, as it is not intended that the trustees should sell or otherwise dispose of the policy.

The trusts of the policy-moneys are generally declared by reference to the trusts of the other trust funds. The husband should covenant with the trustees to keep the policy on foot and renew it if it should become void or voidable, the covenants being of the same nature as those in a mortgage of a policy (*ante*, p. 196).

Sometimes there is a power enabling the trustees, on the husband's default, to apply any part of the income, or even of the capital, of the trust funds in paying the premiums, or even to borrow money for that purpose (2 K. & E. 484). But the propriety of inserting such a power must depend on the circumstances of the case. If the policy be for a large amount, and the other settled funds be but small, the burden of keeping up the policy out of the income of the settled funds might, if the husband became unable to pay the premiums, be very serious, and might leave a very small income for the wife and family to live on. It is desirable to leave a good deal of discretion to the trustees as to whether, on the husband's default, they should keep up the policy or not. They ought to be empowered, if they think fit, to surrender it, and to hold the sum received on the surrender upon trusts for accumulation during the husband's lifetime, and to hold the total sum accumulated upon the same trusts, after the husband's death, as those of the policy-moneys.

Payment of premiums by trustees out of their own moneys.

Trustees have a right to be indemnified out of their trust property for money properly spent by them in preserving it; and accordingly they have a lien on a trust policy for the amount of premiums paid by them out of their own moneys, if it is their duty to keep up the policy, and there are no trust funds properly applicable for that purpose, but not otherwise; and, in cases where the trustees would have a

lien on the policy for premiums paid by them, they can give a like lien to another person who advances money to them for the purpose of paying the premium. (*Clack* v. *Holland*, 19 Beav. 262; *Gill* v. *Downing*, L. R. 17 Eq. 316; *Re Leslie*, 23 Ch. D. 552; discussed in *Re Winchilsea*, 39 Ch. D. 168.)

Bonus.

Having regard to the fact that a bonus is an accretion to the principal sum secured by a policy (*Roberts* v. *Edwards*, 33 Beav. 259), and that consequently it cannot, in the absence of an express power, be applied in reducing the premiums, liberty is sometimes given to the trustees at the request of the husband to apply the bonus for that purpose. (See form in 2 K. & E. 485.)

(*b*.) Clauses of the second sub-class (*ante*, p. 307) consist of—

(). The investment clause.

($\beta$). The power to invest in land, and its accompanying trusts and powers.

($\gamma$). The receipt clause.

To whom powers are given.

As a general rule, the powers and trusts of a settlement of personalty are made exercisable "by the said [*trustees*] or the survivors or survivor of them, or other the trustees or trustee of these presents, with the consent of the said [*intended husband and wife*] during their joint lives, and of the survivor of them during his or her life, and after the death of such survivor at the discretion of the trustees or trustee for the time being." The reader will observe that the power is not in terms given to the assigns of the trustees, thus differing from the powers in a mortgage deed which are expressly given to the assigns of the mortgagee. The reason is obvious; it is not intended that the persons to whom the trust fund may be assigned on any sale should exercise the powers; the only assigns intended to exercise the powers are new trustees, and their right to exercise the powers does not arise in their capacity as assigns of the property, but as being trustees duly appointed. The words, "or the survivors or survivor of them," are not necessary in deeds after 1882, as the Trustee Act, 1893, s. 22 (re-enacting the repealed provision of the C. A. 1881, s. 38),

provides that a power or trust given to or vested in two or more trustees jointly by an instrument coming into operation after 1881 is to survive unless the contrary is expressed; but it is the usual practice to insert them in the first place where they occur, and to add the words, "hereinafter called the said trustees, or trustee," and afterwards to use the words "the said trustees or trustee."

How consent is given.

The consent to the exercise of any power should be given in writing, if no particular method of giving consent is prescribed; and the writing should, for the security of the trustees, be carefully preserved.

An infant wife can exercise a power of consenting to changes of investment (*Re Cardross's Settlement*, 7 Ch. D. 728). The question as to what other powers she can exercise will be found discussed fully in *Re D'Angibau*, 15 Ch. D. 228.

The investment clause.

(*a*). According to the rule of the Court of Chancery, where money in the hands of trustees was to be invested, the only investment allowed was a Government Three per Cent. Stock. Owing to the very limited range of investment authorised by this rule, it became the practice to insert in every well-drawn settlement a power of investment directing the trustees either to allow the property (but as regards any reversionary interests after the same should have fallen into possession) to remain in its actual state of investment, or to sell it and invest the proceeds in certain specified securities, with power from time to time to vary the securities.

Statutory investments.

Various Acts of Parliament have been passed from time to time authorising trustees to make investments not expressly authorised by the instrument creating the trust. The statutory provisions now in force regulating investments by trustees are contained in the Trustee Act, 1893 (55 & 56 Vict. c. 53), Part I., replacing similar provisions of the Trust Investment Act, 1889 (52 & 53 Vict. c. 32). These enable a trustee, "unless expressly forbidden by the instrument creating the trust," to invest trust funds,

"whether at the time in a state of investment or not," as therein mentioned.

Shortly after the passing of the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), authorising the investments therein specified, it became a common practice to prohibit all investments except those expressly authorised by the instrument creating the trust; but at the present day such a clause is very seldom inserted. In the absence of prohibitory words, trustees may invest on any securities authorised by statute for investment of trust money, as well as on the securities expressly authorised by the instrument creating the trust.

It is by no means clear whether the earlier Acts authorised trustees to sell existing investments for the purpose of making an investment authorised by the statute, unless perhaps where they had under the instrument creating the trust a power to sell or to vary investments (*x*). The words, "whether at the time in a state of investment or not," in the Trustee Act, 1893, appear to permit a sale for the purpose of investing in any of the investments authorised by the Act (*y*).

The following remarks upon the statutory powers of investment may be of use to the student. The power of trustees to invest in debenture or guaranteed or preference stock of a railway or water-works company depends upon whether the company has, during "each of the ten years last past before the date of the investment, paid a dividend" of not less than a certain rate on its ordinary stock. (Trustee Act, 1893, s. 1 (*g*) and (*l*).) If such stocks are redeemable, the powers of the trustees are further limited by the provisions of s. 2. Their power to invest in the stock of Water Commissioners depends upon the amount of the rates levied by the Commissioners during each of the

(*x*) *Re Manchester Royal Infirmary*, 43 Ch. D. 420; *Re Warde*, 2 J. & H. 191; *Waite* v. *Littlewood*, 41 L. J. Ch. 636; *Re Clergy Orphan Corporation*, L. R. 18 Eq. 280; *Re Dick* (1891), 1 Ch. 423; (1892), A. C. 112.

(*y*) See the Trustee Act, by Ellis.

ten years prior to the date of investment. Ib. s. 1 (*n*). It appears to be clear that trustees cannot safely make investments of these classes without having evidence as to payment of dividends or as to the amount of the rates (*z*). Where the statutory power of investment is relied upon, it is expedient either to state expressly what evidence the trustees may act upon, or to remove these restrictions so as to render it unnecessary to obtain the evidence in question. It is, however, the practice not to rely on the statutory powers, but for the reasons following to insert an express power of investment.

First, the range of investment usually given in a settlement is larger than that given by law; secondly, it is desirable (in those cases at least in which the greater economy obtained by brevity is not of primary importance) to state clearly in the settlement itself, for the information of the trustees, what they are to be at liberty to do; for it generally happens that one at least of the trustees is a man competent to read the investment clause, so that, if the clause is inserted, it will not always be necessary to seek professional advice when an investment has to be changed. Moreover, the statutory powers are involved in some complexity by the provisions above referred to.

Express power of investment.

It is quite impossible to lay down any precise rule as to what is a fair range of investments. It must be remembered that the safest investments generally give the lowest rate of interest: and that the poorer the family is the more important it is, on the one hand to render the trust funds absolutely safe, and on the other hand to obtain a large income from the settlement funds. A fair range includes Government funds or securities of the United Kingdom, or India, or any colony; any securities the interest whereon is guaranteed by Parliament; stocks of the Banks of England or Ireland or of the Metropolitan Board of Works, or London County

(*z*) See these questions discussed in 34 Sol. J. 4, in an article on the repealed Act of 1889. As to the meaning of "each preceding year," see 33 Sol. J. 789.

Council; real or leasehold securities in England, Wales, or Ireland (some practitioners except Ireland); debentures, debenture stock, preference or guaranteed stock of any railway in the United Kingdom or India, and ordinary stock or shares of any railway company in India the interest on the capital whereof is guaranteed by the Government of India; charges created under the Improvement of Land Act, 1864, and mortgage debentures issued under the Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78); the bonds or securities of any public body or local authority in the United Kingdom; and, if the parties are connected with Ireland, land debentures issued pursuant to the Land Debentures (Ireland) Act, 1865 (28 & 29 Vict. c. 101), as amended by the Landed Estates Court Act, 1866 (29 & 30 Vict. c. 99). A solicitor acting for trustees will be careful to see that no investments are authorised under which they might incur any personal liability; such, for instance, as shares in a limited company not fully paid-up, or in an unlimited company, in which case, as they would be the owners on the register, they would be liable to calls, &c.

Duties of trustees lending money on mortgage.

A trustee making an investment must select only investments authorised by statute or by the express provisions of the instrument creating the trust; and in making the selection he must use the same care and caution which an ordinary man of business, regardful of the pecuniary interests in the future of those having claims upon him, would exercise in the management of his own property (see *Speight* v. *Gaunt*, 22 Ch. D. 727, 9 App. Cas. 1; *Learoyd* v. *Whiteley*, 12 App. Cas. 727); and therefore he should have the title of any land proposed as a mortgage security properly investigated and a valuation of it made (*Smethurst* v. *Hastings*, 30 Ch. D. 490) (*a*). In

(*a*) But a trustee lending on mortgage of leaseholds may dispense with the production or investigation of the *lessor's* title, Trustee Act, 1893, s. 8 (2), replacing Trustee Act, 1888, s. 4 (2); and he may be justified in accepting a shorter title than that to

cases not falling within the Trustee Act, 1893, he should not, as a general rule, lend more than two-thirds of the actual value of freehold land, or more than half the actual value of freehold houses (*Stickney* v. *Sewell*, 1 My. & C. 8; *Re Olive*, 34 Ch. D. 70), or of leaseholds (*Macleod* v. *Annesley*, 16 Beav. 600; *Vickery* v. *Evans*, 33 Beav. 376, and the cases there cited; Lewin on Trusts, Cap. XIV., p. 363 *et seq.*).

It is generally prudent, though not absolutely necessary, that the valuation should be made by a surveyor acquainted with the district where the land is situate (*Budge* v. *Gummow*, L. R. 7 Ch. 719; *Fry* v. *Tapson*, 28 Ch. D. 268); and the valuation should not be one made on behalf of the intending mortgagor. "It is a matter of constant observation," says Lord Romilly, M.R. (in *Ingle* v. *Partridge* (No. 2), 34 Beav. 412), "that nothing is more uncertain than a valuation; and the Court has constantly had occasion to observe upon the great discrepancy between valuations made by those persons who want to enhance, and by those persons who want to depreciate, the value of property. They are so great that it is very difficult for the Court to come to a satisfactory conclusion on the subject; and it sometimes leads to most singular results. In one case, to which I have often referred, a plaintiff was compelled to compromise his suit, in consequence of his valuer mistaking the side for which he was employed. Valuations are mere matters of opinion, on which a person cannot be indicted for perjury. A man *bonâ fide* forms his opinion, but he looks at the case in a totally different way when he knows on whose behalf he is acting" (*b*).

With respect to the valuation of the property offered as a security to trustees, and as to the amount which may be properly lent, regard must be had to the provisions of s. 8 of the Trustee Act, 1893 (replacing the similar provisions of s. 4 of the Trustee Act, 1888). These are to the effect

which a purchaser is entitled in the absence of special contract, ib. s. 8 (3).

(*b*) As to the liability of a valuer, see *Le Lievre* v. *Gould* (1893), 1 Q. B. 491.

that a trustee is not to be chargeable with breach of trust "by reason only of the proportion borne by the amount of the loan to the value of the property," *provided* (1) that in making the loan the trustee acted upon a report as to the value "made by a person whom he reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere"; (2) that the amount of the loan does not exceed two-thirds of the value of the property as stated in the report; and (3) "that the loan was made under the advice of such surveyor or valuer expressed in the report." (See on this section, *Re Somerset* (1894), 1 Ch. 231.) It must be particularly borne in mind that the valuer should be chosen, employed, and paid by the trustee, and be altogether independent of the mortgagor; and that the advice that the loan be made should be expressed in the valuer's report, which should state what amount may be advanced.

Real securities.

When the power does not authorise an investment on leaseholds, *eo nomine*, but is merely a power to invest in "real securities," ordinary leaseholds are not within the power. The general opinion of conveyancers was that chattel interests in land, such as long terms of years, not burdened by rent or covenants, were within a power to invest in real securities (2 Dav. Prec., part 2, 460; 3 Dav. Prec. 37; *Re Chennell*, 8 Ch. D. 492); but this opinion was disapproved (*Re Boyd's Settled Estates*, 14 Ch. D. 626; *Re Leigh*, 35 W. R. 121). The question is now set at rest by a provision (expressly made retrospective) in the Trustee Act, 1893, s. 5 (1) (replacing s. 9 of the Trustee Act, 1888), that "a trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption, or

to any condition for re-entry, except for non-payment of rent."

Trustees lending trust-moneys as part of an aggregate sum.

It is improper for trustees, unless they are expressly authorised, to join with others in a contributory mortgage, so as to mix up the trust fund with the rights of strangers (*Webb* v. *Jonas*, 39 Ch. D. 660); nor should they take a joint mortgage in the name of a common trustee (*ante*, p. 156). The attention of the reader is called to this, as the practice is by no means uncommon. It will be observed that, in the latter case, the breach of trust consists in the fact that the trustees do not advance the money on the real security: they advance it to another person as the common trustee, and have not the land itself as a security, for the common trustee can get paid off and discharge the land.

Trustees who lend money on mortgage, lend it as if it belonged to them absolutely, and in the mortgage deed it is stated to belong to them on a joint account (*ante*, p. 154).

Transfer of mortgage on appointment of a new trustee.

If a new trustee is appointed, there is a transfer of the mortgage in the usual manner, founded on a recital that the mortgage money and interest have become the property of the continuing and new trustees (naming them). Doubts have been suggested whether a future purchaser would not be entitled to know how the new trustees became entitled. But the better opinion is, that the statement by the continuing trustees (who have become the owners of the mortgage debt) as to the change of ownership confers an equitable title, to which they are bound to add the legal estate. Whatever may be the theoretical doubts as to the validity of such a transfer, it is universally adopted in practice. (See form in 2 K. & E. 223.)

Power to invest in purchase of land.

(*β*). Sometimes it is thought desirable to enable the trustees to invest the trust funds in the purchase of land. The propriety of the insertion of this clause, which, with the accompanying powers, is rather long, must depend on the circumstances of the particular case. If the sum put into settlement is large, such a clause should always be

inserted. When the settled property is small, it appears to be unnecessary; unless, indeed, it be thought desirable for the purpose of enabling a house to be purchased as a residence for the married pair. If, however, the husband has some unsettled property of his own, it can hardly be necessary to insert the clause for this reason only, as the trustees could, under the power to lend the trust funds on mortgage, advance him part of the cost of the house.

The power of purchase generally extends to freeholds, copyholds, and leaseholds having at the time of the purchase at least sixty years to run. Trusts are declared for re-sale at the usual request or discretion, with a declaration that the proceeds of the sale shall be subject to the same trusts as the money laid out in the purchase would then have been subject to if no purchase had been made. Then follows a declaration that the rents of the purchased land shall, till re-sale, be applied in the same manner as the income from the moneys laid out would have been applied if no purchase had been made; thus making the person entitled to a life interest in the income equitable tenant for life of the purchased land till re-sale. (See form in 2 K. & E. 502.)

See as to the omission in settlements since 1881 of the power to sell by public auction, &c., *ante*, p. 312.

If the purchase of land is in actual contemplation, it may be proper to insert the clauses as to management and powers of leasing (*ante*, p. 312), and as to notices under the S. L. A. (*ante*, p. 131).

Difficulties on re-sale.

When trustees purchase land in pursuance of the trust, the conveyance is usually made to them upon the trusts of the settlement (see form in 1 K. & E. 506); but occasionally it is made to them as joint tenants simply, without any mention of the trust. In this case a declaration of trust should be made by a separate document, and may conveniently be effected by a memorandum indorsed on the settlement, and signed by the trustees. This latter plan may possibly give rise to a little difficulty on a sale. For,

when it is adopted, there is generally some reason which makes it undesirable to disclose the trusts, and therefore the trustees sell as absolute owners; so that the purchaser is entitled to the usual covenants for title, either express or implied, covenants which the trustees may be unwilling to enter into. But, if no change of trustees has taken place since the purchase, the usual covenants for title really extend only to the acts of the covenanting parties; and therefore the trustees may be willing to enter into them. The solicitor acting for the trustees must, however, be careful not to allow a trustee to enter into such covenants, without clearly explaining to him the nature of the liability he takes upon himself, and that he is not bound to incur such a liability. The usual method of getting over the difficulty is to sell under a condition that the purchaser shall not be entitled to any covenants for title, except a covenant that the vendors have not incumbered, nothing being said about their being trustees.

If one of the trustees should die, a difficulty in respect of death duties would occur on the sale of the property in cases where the fact of the purchase having been made with trust moneys is intended to be concealed; for, although no duty is due on the death of a trustee, yet, in order to prove to a purchaser that none was payable, it would be necessary to show that the person dying was a trustee, which is exactly what it is wished to conceal.

Further, considerable difficulty will occur on the death of the surviving trustee; for it will be the duty of his personal representative (C. A. 1881, s. 30) to convey the land in accordance with the trust, but as it is not known that it is trust property the land would appear to vest in his heir or devisee; and the result is that it will hardly be possible to sell the land without disclosing the fact that it is trust property.

Unauthorised purchase of land.

It should be observed that, if an unauthorised investment be made in the purchase of land, care must be taken to keep the trusts off the title: for otherwise, as the *cestuis*

*que trustent* have a right to elect to proceed against the trustee either for the land or the money (Dart, V. & P. 688, 1067), difficulties may occur on a re-sale. But as any one *cestui que trust* has a right to insist on the land being turned into money, the difficulty may be obviated by the concurrence of one *cestui que trust* in the sale (see *Re Patten and Edmonton Guardians*, 52 L. J. Ch. 787; 31 W. R. 785).

Receipt clause.

(γ). The object of the receipt clause was to enable payments to be safely made to the trustees notwithstanding the rule of equity which rendered persons liable for the proper application of moneys paid by them to any person other than the true beneficial owner. The question when a power to give receipts was implied formed an important head of equity, which cannot be discussed here; but it may be mentioned that the principal cases where the power to give receipts was implied were :—1st. When, under a will, there was a trust for payment of debts generally, or of debts and legacies; for to see to the application of the moneys would in this case be an unreasonable burden on the person paying the trustees. 2nd. When the trust was of such a description that the performance required time and discretion. 3rd. Where trustees had a power of investing and varying securities. (*Locke* v. *Lomas*, 5 De G. & Sm. 326.)

Where implied power to give receipt.

The receipt clause was often omitted in settlements executed after the 28th August, 1860, in reliance on Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 29. This section, which applied only to money, was repealed, and re-enacted in an extended form by the C. A. 1881, s. 36, which is now repealed, and re-enacted by the Trustee Act, 1893 (see s. 20), by virtue of which the receipt in writing of any trustee (whether his trust was created before or after the commencement of the Act) is a sufficient discharge for "any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power." The receipt clause is now wholly unnecessary

and should not be inserted, except possibly where some of the trust property is or may be situate in a Colony or foreign country.

When money has to be paid to several trustees, the proper course is for them all to attend to receive it. If this cannot be done, the money should, in Lord St. Leonards' opinion, be paid by their direction to an account in their joint names in a bank, as it is by no means clear that payment by their written direction to their agent duly authorised will discharge the person paying it (Dart, V. & P. 684; 2 Dav. Prec., pt. 1, 331; 3 Dav. Prec. 223; *Re Bellamy*, 24 Ch. D. 387). But (Trustee Act, 1893, s. 17, replacing Trustee Act, 1888, s. 2) a trustee may appoint his solicitor his agent to receive and give a discharge for money or other trust property by permitting him to have and produce a deed having such receipt as is mentioned in the C. A. 1881, s. 56 (*ante*, p. 87). In practice this course is usually adopted where there are several trustees.

Power to apportion blended trust funds.

(*c.*) Sometimes it may be doubtful whether part of the trust property is capital or income, or whether expenses should be borne out of capital or income; or it may happen that ultimately different parts of the settled property become payable to different persons, and that, owing to the manner in which the property is invested at the time of division, it is doubtful which part has been produced from each original fund. To avoid these difficulties, power is given to the trustees to determine whether any part of the trust property is capital or income, how expenses are to be borne, and to apportion the trust funds between the parties entitled thereto. (See form in 2 K. & E. 515.)

The power to determine questions and arrange and compromise.

(*d.*) The powers to determine questions and to arrange and compromise are the following:—*First*, to determine all matters of doubt in the execution of the trusts; *second*, to compromise or submit to arbitration any dispute about the trust property; *third*, to settle accounts; *fourth*, to execute releases. All these powers, except the first, are (in the absence of a contrary intention expressed in the instrument

creating the trust) given to trustees, or a sole trustee (whether the trust was created before the Act or not), by the Trustee Act, 1893, s. 21 (replacing C. A. 1881, s. 37), and therefore the three latter powers are unnecessary, and are now seldom inserted.

Where part of the property consists of a reversionary interest under a prior settlement or will (*c*), it is generally convenient to insert the full clause slightly extended, so as to authorise the trustees to allow expenses incurred, not strictly according to law, by the trustees of the prior instrument, and to condone breaches of trust (see form in 2 K. & E. 515); and, if the property settled consists of a reversionary share, express power should be given to the trustees to ascertain the value of the share in such manner as they may think fit, though possibly this may be covered by the Trustee Act, 1893, s. 21. It is obvious that, when the reversion falls into possession, its value may have been diminished owing to some unauthorised expenditure, or by a breach of trust by the trustees of the prior instrument; and, if this is the case, or if, owing to some confusion in the accounts, there is difficulty in ascertaining what is the amount to be paid to the trustees of the settlement, they may, in the absence of the clause, be forced to institute an action for the administration of the trusts of the prior instrument.

As to condoning breaches of trust under prior instrument.

Where a share derived under an earlier settlement or will is settled, any breach of trust already committed which it is intended to condone should be expressly mentioned and condoned; and if it is intended to commit a breach of trust in the future, as by continuing an unauthorised investment, it should be declared that the trustees of the sub-settlement should not be bound to take any proceedings in respect of such breach of trust, unless requested by the beneficiaries under the sub-settlement. (2 K. & E., p. 516.)

(*c*) See Stud. Prec. 103, for an example.

It should be remembered that an agreement in a settlement on marriage condoning, or authorising the trustees to condone, breaches of trust under a prior instrument, may, where one of the trustees committing the breach of trust is *in loco parentis* to one of the persons marrying, and possibly in other cases, be void as amounting to marriage brocage (*d*).

Condonation void as marriage brocage.

*Clauses of the Second Class* (*see ante*, p. 307).

The question whether the husband or the wife should take the first life interest in the property brought into settlement on the part of the wife is fully discussed in 3 Dav. Prec. 68. Though in any particular case this is a matter for agreement, still it may be said that at the present day the usual practice is for each to take the first life interest in the property settled on his or her behalf, except that sometimes, where the husband is engaged in trade, the wife takes the first life interest in both properties; for, in such cases, the risk intended to be guarded against by the settlement is not that of disagreement between husband and wife, but that of the husband falling into pecuniary difficulties.

The wife generally takes the first life interest in her own property.

Where the wife takes the first life interest in any part of the trust funds, the income is given to her for her separate use during her life, and generally with a restraint on anticipation.

Separate use.

If by a settlement the income is given to the wife for her separate use, without a restraint on anticipation, she is exactly in the position of a *feme sole* in respect of it; she can dispose of her interest during the joint lives, and is exposed to pressure on the part of her husband or his creditors to do so; but when the restraint on anticipation is added, the income becomes practically inalienable.

There is some difficulty in understanding the phrase

Without power of anticipation.

(*d*) *Hamilton* v. *Mohun*, 1 P. W. 118; S. C. 2 Vern. 652; *Keat* v. *Allen*, 2 Vern. 588. See the notes to *Scott* v. *Tyler*, 1 W. & T. L. C.

"without power of anticipation": for, as the only place where it is used with a technical meaning is in the clauses under consideration, it is sometimes erroneously supposed to mean "inalienable."

Suppose that the owner of Consols, immediately after he has received his dividend, goes with the money in his pocket to a shop and makes a purchase, which he pays for out of it, he applies his dividend not by way of anticipation. On the other hand, if he makes the purchase before he has received the dividend, and promises to pay out of the dividend when received, he disposes of it by anticipation. So if he sells his stock, he disposes of the whole of the future dividends by way of anticipation. Generally speaking, the law does not allow a restraint on anticipation to be imposed on income; if income be given to a man with a restraint on anticipation, the restraint is absolutely void: he can dispose of it as absolute owner (see M. L. R. P. 195). How, then, does the restraint on anticipation protect a woman? It will be remembered that a married woman was before 1883 absolutely unable to contract, except with respect to property constituted her separate estate, either by express declaration or under the M. W. P. A. 1870; and that all income coming to her during the coverture belonged at law to the husband. Equity, which gave to her the rights of property in respect of her separate estate, gave her also a power of contracting with respect to it; but when the words "without power of anticipation" were added, Equity modified the power of contracting, so that it did not apply to contracts made by way of anticipation, and her Common Law incapacity of contracting remained; and as she could not dispose of her income by way of anticipation, either at Common Law or by virtue of any power given to her by Equity, she could not dispose of the corpus, for this would in effect be to dispose of the income to arise from it in the future. Where the woman marries after 1882, the M. W. P. A. 1882, which gives her a statutory power to hold, dispose of, and contract in respect of her property, expressly

declares (s. 19) that nothing in the Act shall "interfere with or render inoperative any restriction against anticipation attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument." So that, where the restriction is imposed, she is in the same position as a woman married before 1883, with respect to separate property as to which she was restrained from anticipation. See, as to the "restraint on anticipation," M. L. R. P. 128; M. L. P. P. 390.

Although the restraint on anticipation is generally inserted, there are a few cases—as, for instance, on the marriage of a woman of mature years—where it may properly be omitted.

Income generally paid to husband.

In most cases, the income of property settled on the wife without power of anticipation is paid by the trustees to the husband by the tacit permission of the wife. The question has to be considered whether the trustees are justified in acting in this manner, or whether it is not their strict duty to obtain the wife's consent for each such payment. In other words, can the wife charge them as for a breach of trust in making such payments? The older opinion, founded on the analogy of the cases as to pin-money, was that the wife was entitled to recover one year's arrears of income. But the modern doctrine appears to be that the wife is not entitled to any account. Although most of the cases (which are collected in a note to *Payne* v. *Little*, 26 Beav. 1, at p. 5; and see per Jessel, M.R., in *Dixon* v. *Dixon*, 9 Ch. D. 587) relate to separate estate where there is no restraint on anticipation, still the grounds of the decision appear to apply equally to the cases where that restriction is imposed (*e*). The case of *Rowley* v. *Unwin*, 2 K. & J. 138, confirms this view. Trustees acting in this manner should be careful not to continue the payments to the husband if circumstances arise (such as the husband's

(*e*) See 1 Vaizey on Settlements, pp. 787 *et seq.*; *Edward* v. *Cheyne*, 13 App. Ca. 385.

pecuniary embarrassments, or grave dissensions between husband and wife) which would probably cause the wife to wish to have the payments made to herself (3 Dav. Prec. 73 (*d*) ).

The modern form (2 K. & E. 466; Stud. Prec. 111) of the trust for separate use without power of anticipation consists of directions to the trustees to pay the income to the wife during her life, for her separate use, without power of anticipation (*f*).

Where the wife takes the second life interest (*i.e.*, a life interest after her husband's death) in personal property under a settlement made before 1883, it is a reversionary chose in action, which is not alienable by her during the coverture (*ante*, p. 302); but where she takes it under a settlement made since 1882, it may be argued that she can alienate it by virtue of the M. W. P. A. 1882; and until it is decided (as it probably will be) that this view is erroneous, it will be proper expressly to restrain her from anticipating it, which in effect renders it inalienable during the coverture. (See form in Stud. Prec. 110.)

Payment of income to the survivor.

But to return to the general frame of the settlement. Where the wife takes the first life interest, the trust for the wife during her life is generally followed by a trust for the payment of the income to the husband, if surviving, during his life; but sometimes the property is still further protected by making the interest of the husband, in case of his surviving the wife, determinable on alienation or bankruptcy.

Trusts determinable on bankruptcy (*g*).

In framing such a trust, we have to bear in mind—*first*, that it is impossible to give to any person a continuing

(*f*) The doctrine of separate estate is discussed in the notes to *Hulme* v. *Tennant*, 1 W. and T. L. C. A collection of cases as to what amounted under the old law to a gift for separate use will be found in Interp. 297 *et seq.*; 1 Vaizey on Settlements, 754 *et seq.* See also the important cases of *Massey* v. *Rowen*, L. R. 4 H. L. 288; *Taylor* v. *Meads*, 4 De G. J. & S. 597; *Bishop* v. *Wall*, 3 Ch. D. 194; *Cooper* v. *Macdonald*, 7 Ch. D. 288.

(*g*) See M. L. R. P. 195, Vaizey on Settlements, 947; 2 K. & E. 469.

interest in property after bankruptcy (*Brandon* v. *Robinson*, 18 Ves. 429; *Graves* v. *Dolphin*, 1 Sim. 66); *secondly*, that property cannot be so settled on any person, except a married woman, as to take away the power of alienation to the extent of his or her interest in it (see Co. Lit. 222, *b*, and the exception, Co. Lit. 223 *a*; *Re Macleay*, L. R. 20 Eq. 186); but *thirdly*, income can be settled on a man *till* he becomes bankrupt (*Lockyer* v. *Savage*, 2 Stra. 947; *Ex parte Hinton*, 14 Ves. 598; *Kearsley* v. *Woodcock*, 3 Hare, 185; *Ex parte Eyston*, 7 Ch. D. 145), or *till* he alienates or attempts to alienate it (*h*). This third rule is subject to the exception that a settlement on a person of the income of his own property (*i*) till *bankruptcy* is considered as a fraud upon creditors, and the trustee in bankruptcy takes the whole interest originally given (*Higinbotham* v. *Holme*, 19 Ves. 87). It was formerly considered that in the case of a settlement on a person of the income of his own property till *alienation* the restriction was void, but this is not the case. (*Brooke* v. *Pearson*, 27 Beav. 181; *Knight* v. *Browne*, 9 W. R. 515; S. C. 30 L. J. Ch. 649.) It follows that the income of all the property comprised in the settlement can be settled on the husband till he attempts to alienate it, and that the income of all the property except that belonging to him originally (*belonging to him*, not that brought into settlement on his behalf) can be settled on him till his bankruptcy: so that the life interest of the husband in the whole of the property can be made inalienable, and his life interest in the whole of the property, except that which

(*h*) The same result may be obtained by a limitation in favour of a man for life, followed by a proviso that his interest shall cease on bankruptcy or alienation; and this appears to be effectual even though there is no gift over to another person in that event; but a mere direction that a man shall have no power to alienate without the addition of a proviso for cesser of his interest would be inoperative; see *Rochford* v. *Hackman*, 9 Hare 475, and other cases discussed in 36 Sol. J. 181.

(*i*) Which does not include property which never belonged to him, but was settled to such uses as he and another person should appoint. *Re Ashby* (1892), 1 Q. B. 872.

originally belonged to him, can be secured as against his trustee in bankruptcy. In a settlement of this nature, we have to provide for the destination of the income at the determination of the husband's interest; it is generally convenient to declare that it shall be held on the same trusts as if he were dead.

Protected life interest—Discretionary trust.

There is, however, a plan slowly coming into use which appears to give a still greater protection to the husband's interests—the plan of a discretionary trust (3 Dav. Prec. 125.) When this is adopted the trustees are authorised after the determination of the husband's life interest, during the residue of his life to pay all or any part of the income to, or to apply it towards the maintenance and support of, the husband, his wife for the time being, his children by any wife, and the other persons for the time being interested under the settlement, or any of them to the exclusion of the others. (See form in 2 K. & E. 470; Stud. Prec. p. 109, note.)

The object of the clause is to make an inalienable provision for the family and subject thereto for the husband. It is therefore of importance to extend the class of objects of the discretionary trust somewhat widely, for if, as sometimes happens owing to misapprehension of the object of the clause, it is restricted to the husband, the intended wife and his children by her, it may be ineffectual. For although, so long as the wife or children are alive, the trustees will be able to keep up a house for them, which the husband can share; yet, after the death of the wife and failure of children, there would, if the clause be restricted, be no object of the power other than the husband; and the protection to him would partially fail, for even supposing that the trustees could, after he had assigned his life interest or had been made a bankrupt and had not received his discharge, safely apply any money for his benefit, still his assignees or the trustees in bankruptcy might be able to recover from him any moneys paid to him by the trustees. If, however, the class be extended as above suggested, there would still be other objects of the power—viz., in the ordinary form of

settlement, the deceased wife's next of kin. And, although the husband would probably not live with them, still the trustees could pay them the money; and it is probable that some of it would find its way as a gift to the husband. In such a case, the trustees should most carefully guard against using any expressions when they pay the money which would tend to cast any obligation on the person to whom they paid it to hand it over to the husband; for a trust for the husband might thus be raised, which would enure for the benefit of the trustee in bankruptcy, or for the alienee. It should be observed that the Court will not interfere with the discretion of trustees exercising a trust of this nature *bonâ fide*, even if in its opinion they are not acting judiciously. (See Lewin on Trusts, Chap. XXIV. pp. 728 *et seq.*)

The free use of determinable life interests and discretionary trusts appears to be one of the most fertile fields for improvement in modern conveyancing. Suppose, for instance, that where the wife's property is very large, the husband's advisers object to her taking the first life interest in the whole, they could not object to any interest that the husband takes during the wife's lifetime being made determinable on his bankruptcy or alienation, particularly if it be followed by a discretionary trust for him or his wife.

Charge of maintenance.

As to property belonging to the husband originally, a certain degree of protection against his bankruptcy may be obtained by making his life interest subject to the obligation of providing a suitable residence for and maintaining his wife and of maintaining and educating his infant children, and possibly, if required by the trustees, of making suitable allowances to adult children. (See *Carr* v. *Living*, 28 Beav. 644, 33 Beav. 474. *Re Booth* (1894) 2 Ch. 282.) The insertion of such provisions would render it difficult for him, unless his wife were to die leaving no children, to raise money on mortgage of his life interest; and, in the event of his bankruptcy, the children, or wife and children, would have a right to have their maintenance, &c., provided for out of the funds passing to the trustee in bankruptcy. If

this plan be adopted, it is advisable to declare that, if the husband releases his life interest in any part of the property to a child, such part shall be discharged from the trusts in question; otherwise it would be impossible for the husband, even with the concurrence of all the adult children, to make a present provision for any adult child so long as any child remains a minor. (*Berry* v. *Briant*, 2 Drew. & Sm. 1; see form in 2 K. & E. 473.)

*Clauses of the Third Class* (*see ante*, p. 307).

These consist usually of the following clauses:—

(α). The power of appointment among the "issue" of the marriage, *i.e.*, all lineal descendants of the husband and wife.

(β). Trusts for the children in default of appointment.

(γ). The hotchpot clause.

(δ). The advancement clause.

(ε). Maintenance and Accumulation.

The power of appointment.

(α). A power of appointment (*k*) is given to the husband and wife jointly; and, in default of and subject to any joint appointment by them, a further power of appointment is given to the survivor of them. The class of objects being limited, the powers are "special" or "particular" powers, as distinguished from "general" powers to appoint to any person whom the donee may select (under which he might appoint to himself). The objects should always be the "issue," and not the children only of the marriage; for thus provision can be made for the issue of a deceased child, or of a child who has become bankrupt, or alienated his interest under the settlement.

It was formerly necessary to state expressly that an appointment might be made in favour of one or more of the issue, to the exclusion of the others; but this is now unnecessary. See the Powers of Appointment Act, 1874 (37 & 38 Vict. c. 37).

The class of issue who are to be objects of the power is

(*k*) As to Powers, see M. L. R. P. 298, *et seq.*

sometimes expressly restricted to those born within twenty-one years after the death of the survivor of the husband and wife, and it is expressly stated that the appointed interests must be made to vest within that period. This restriction is made with reference to the rule against perpetuities (*Cadell* v. *Palmer*, Tud. L. C. R. P.); but it is not necessary, for a power to appoint among issue generally is valid, although an exercise of such a power would be void if it attempted to create an interest to arise after the limit of time allowed by the rule (*l*).

If the power be to appoint to issue generally, it must be borne in mind that the test of the validity of any exercise of a special power is whether the appointed interests could have been inserted, consistently with the rule against perpetuities, in the settlement itself (*m*).

The power should be very wide in its terms. It should authorise the appointment to be made at any age or time, in any shares, with any future executory or other trusts for the benefit of the issue; with provision for their maintenance, education, or advancement (see *post*, p. 350), at the discretion of the trustees of the settlement, or otherwise; and, generally, upon any conditions, with any restrictions, and in any manner. (See form in 2 K. & E. 474; Stud. Prec. 99.)

Execution.

The joint power of husband and wife is generally made exercisable by deed. It is inadvisable to require the appointment to be executed in any particular manner, though this was often done in old settlements. By the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 12, execution of a deed of appointment in the presence of two witnesses is sufficient, notwithstanding that special formalities are required by the terms of the power. But, in practice, the terms of the power are complied with.

In default of joint appointment, or so far as such appointment does not extend, the power of appointment among

(*l*) See Lewis on Perpetuities, 487, cited in M. L. R. P. 313.

(*m*) See, on the general question of perpetuities, *post*, p. 388; M. L. R. P. 102, 286.

the issue is made exercisable by the survivor of the husband and wife, by deed, will, or codicil.

Appointment aliquot of share of trust funds or sum of money.

When the power of appointment is about to be exercised, the questions for consideration are the following: Is it intended to appoint an aliquot share of the trust funds, or a particular sum of money or stock? And, if either husband or wife be dead, does the survivor intend to relinquish his or her life interest in the appointed funds?

There appears to be no objection to appointing either an aliquot share of the trust funds, or a particular sum of money. In the former case, although the appointed funds are, till they become payable, subject to the power of varying securities contained in the settlement, some practitioners insert a few words showing distinctly the intention of keeping the power alive; but this is not necessary.

Appointment of specific part of trust funds.

A specific part of the trust funds—such as a certain sum of stock—should never be appointed, unless it is intended that the parent should relinquish his or her life interest in it to the appointee, as this would cause confusion in case the power for changing investments was exercised. If it be wished that the object of the power should really take a certain sum of stock, the proper course appears to be to appoint "all those [*e.g.*, £5,000 2¾ per cent. Consolidated Stock], or, in the event of the trust funds being then otherwise invested, such a sum of money as according to the market value of stock on the day of the death of the survivor of the said [*father and mother*] shall be equal to the then market value of [£5,000 2¾ per cent. Consolidated Stock].

An exception to the rule against appointing a specific part of the trust funds occurs when an investment has been made in land. In this case it is sometimes wished to preserve the land as a family estate, and it is accordingly appointed specifically.

Instrument of appointment.

The appointment is generally effected by a deed-poll, which according to the practice of many leading conveyancers is, if possible, framed without recitals, the power being referred to in the operative part (1 K. & E. 77).

If recitals are inserted, they will include a recital of the settlement, so as to show the existence of the power, that any exercise of the power is subject to the prior interests of the father and mother, that the intended appointee is one of the objects of the power, and sometimes the actual condition of investment of the trust property is stated; though, if the appointment is made with the intention that the appointed share shall be immediately settled, it is more usual to state this in the settlement, and not in the appointment. If, as is often the case, the appointment is made on the marriage of a child in whose favour it is made, it is usual to insert a provision making the appointment void unless the marriage is solemnised within six months. (See form in 1 K. & E. 76; Stud. Prec. 103.)

Trusts for children in default of appointment.

($\beta$) There are two different methods of declaring the trusts for the children in default of appointment, the object being, in either case, to give the trust funds to such of the children as being sons attain twenty-one, or being daughters attain that age, or marry under that age.

By the method employed at the present day, the trust is declared for a class including only such of the children as are intended to take indefeasibly, that is to say, for sons who attain twenty-one, and daughters who attain twenty-one, or marry under that age. (See form in Stud. Prec. 99.)

Formerly the same result was arrived at by a more circuitous method, the trust being, in the first instance, for a class including all the children; so that every child took a vested interest at birth, subject, of course, to be divested or defeated by any exercise of the power of appointment, and subject also to be partially divested by the birth of other children. Then followed a clause called the survivorship and accruer clause, the effect of which was to give to the surviving children both the original share of any child who, being a son, died under twenty-one, or, being a daughter, died under that age without having been married, and also any share which had accrued to him or her under the clause of survivorship and accruer.

For example, let the property be 40,000*l.*, and let four children be born: the eldest when born takes an interest in the whole 40,000*l.*; but on the birth of the second his interest is cut down to $\frac{40{,}000l.}{2}$ or 20,000*l.*; and when they are all born, each takes a vested interest in $\frac{40.000l.}{4}$ or 10,000*l.* Now, suppose one of them to die under twenty-one. His 10,000*l.* is divided into three equal shares of 3,333*l.* 6*s.* 8*d.*, one of which survives to each of the other children. Suppose one of the survivors to die. Then not only his original 10,000*l.*, but also his 3,333*l.* 6*s.* 8*d.* has to be divided between the other two, who take an additional share of $\frac{10{,}000l. + 3{,}333l.\ 6s.\ 8d.}{2} = 6{,}666l.\ 13s.\ 4d.$ So that the total share of each of the two children who survive and ultimately live to attain twenty-one is the original share of 10,000*l.*, together with the share accruing on the death of the first child, 3,333*l.* 6*s.* 8*d.*, and on the death of the second child, 6,666*l* 13*s.* 4*d.*; in the whole 20,000*l.*—exactly the same as he would have taken under trusts in the modern form.

An error is sometimes made by persons ignorant of the real meaning of the survivorship and accruer clause. They add this clause to the ordinary trust for such children as attain twenty-one, &c., in which case it is utterly useless. (4 Martin by Davidson, 437; *Re Colley's Trusts*, L. R. 1 Eq. 496.)

Exclusion of eldest child.

Occasionally, when a large landed property is entailed on the children of the marriage, it is wished, in the event of there being more than one child, to exclude the child who succeeds to the land from taking a share of the settled personalty.

In this case the power of appointment of the personalty is expressed to be exercisable in favour of the children "other than the eldest or any other son who before attaining twenty-one becomes entitled, *or any daughter who before attaining twenty-one becomes indefeasibly entitled*, to the first estate tail under the limitations of" the land. The words in

italics will be inserted if the limitations to the sons are followed by successive limitations to the daughters in tail or tail male. The words "indefeasibly entitled" have reference to the fact that a daughter may at a time when there is no son be entitled to the first estate tail, and may afterwards, owing to the birth of a son, become entitled in remainder only. The trusts in default of appointment will be for the children of the marriage "other than as aforesaid, who attain twenty-one, &c.," in the usual form; followed by a gift (in default of any child becoming entitled under the preceding trusts) to such of the excepted class of children (*i.e.*, any son who before attaining twenty-one becomes the eldest, or any daughter who before attaining, or marrying under twenty-one, becomes in the position of an eldest son owing to all her brothers, if any, having died without having barred the entail, and to the death of one of her parents, so that no other brother can be born) as being sons attain twenty-one, or being daughters attain twenty-one or marry. (See form in 2 K. & E. 476.)

In this scheme, if there be any younger child who attains twenty-one, or being a daughter marries, an eldest son takes no share of the personalty; but a younger child who attains twenty-one, or being a daughter marries under that age, and subsequently becomes entitled to the first estate tail, takes a share in the personalty exactly as if it had remained a younger child; and if there be only one child who attains a vested interest, he takes the whole. Occasionally in a settlement of this nature, a power of appointment is given in the usual form, so as to include the eldest son: and this appears desirable, for otherwise, if there is but one younger child, such child becomes indefeasibly entitled on attaining twenty-one, or being a daughter marrying, so that the parents cannot, by threatening to exercise the power of appointment, prevent such child from borrowing money on its reversion or making a foolish marriage (*n*).

(*n*) See Interp. ch. xxiv. pp. 337 *et seq.*, on "Eldest Son" and "Younger Children."

Hotchpot clause.

(γ) When an appointment is made to a child, or the issue of a child, the mere fact of the appointment does not exclude the child from taking a share in such part of the fund as remains unappointed. This result would generally be contrary to the intention, as it would create inequality among the children. Suppose, for instance, a man has five children, that the settled fund is 50,000*l.*, and that on the marriage of a daughter he appoints 10,000*l.*, to her and makes no further appointment; then she might take one-fifth of the unappointed 40,000*l.*; *i.e.*, another 8,000*l.*, or 18,000*l.* altogether. The usual intention of the person exercising a power of appointment among children is not to create inequality, but to make a fixed provision when necessary, as on the marriage of a child. To prevent inequality, a clause, called the "hotchpot clause," is usually inserted. (See form in 2 K. & E. 477; Stud. Prec. 100.) This modifies the trust for equal division in default of appointment by declaring, that no child to whom a share is appointed shall, in default of appointment to the contrary, take any share in the unappointed part without bringing the appointed share into hotchpot, *i.e.*, until each of the other children shall have received a share equal to his.

When the power of appointment extends to the issue of children, the hotchpot clause should be framed so as to require the shares appointed to such issue, as well as to the children themselves, to be brought into hotchpot.

In cases where a second fund is settled by reference, care should be taken to frame the hotchpot clause, so as to apply, if so intended, to both funds in the same manner as if they formed one fund (*o*).

Advancement (*p*).

(δ) An immediate provision can be made for a child who has attained an indefeasibly vested interest in a share of the trust funds by the parents relinquishing their life interests in the share to the child. If only one of the parents is

(*o*) See *Re Marquis of Bristol* (1897), 1 Ch. 946.

(*p*) See powers of advancement discussed in 38 Sol. J. 248; 2 Vaizey on Settlements, 1049.

alive, and the life interest of such parent is not made determinable on alienation, this course presents no difficulty; but, if the parents are both alive, and the settlement is in the usual form, this course cannot be adopted: for, if the wife takes the first life interest, she will usually be restrained from anticipation during coverture; and, if she takes the second life interest and was married before 1883, she is unable to alienate it, for it is a reversionary chose in action, which, being given to her by her marriage settlement, falls within the exception to the Married Women's Reversionary Interests Act, 1857 (*ante*, p. 302); while, if she was married after 1882, she will generally be expressly restrained from alienating her life interest in remainder.

If, at the time when it is wished to make an immediate provision for a child, no child has attained a vested interest, and both parents are alive, the mother will be under the further disability that she cannot relinquish her reversionary interest under the ultimate trusts in default of any child attaining a vested interest, if they are in the usual form. (See form in Stud. Prec. 114.) Even in the absence of these difficulties the trustees could not, unless they had a special power, advance any part of the capital of the trust for the benefit of a child during its minority.

For these reasons it will generally be necessary, if it be wished to make immediate provision for a child during the lives of both parents, to have recourse to a "power of advancement." (See form in 2 K. & E. 480.)

This is a power given to the trustees, with the usual consents, or at the usual discretion, to apply for the benefit or advancement in the world of any child or more remote issue (*q*) of the intended marriage, part of the share to which, if it attained twenty-one, it would become entitled on the death of its surviving parent. The money might, for instance, be wanted to pay a premium on articling a boy to a solicitor. In the older forms the power was confined

(*q*) Some practitioners confine the power to children; see 38 Sol. J. 248.

to sons, but it ought to be extended to daughters, as it is quite impossible to say that they may not want it. The father may be ruined, and the daughters may have to earn their own livelihood; and in this case the clause may be of the greatest value. If the power be extended to "issue" other than children, this involves its application to appointed shares; for such issue are not included in the trust in default of appointment (see form in Stud. Prec. 99), but can take only under an exercise of the power of appointment.

Mr. Davidson was of opinion (*r*) that the power of advancement as usually framed in favour of children only does not extend to an appointed share. (See 3 Dav. Prec. 159.) If this view is correct, no part of an appointed share can, during the lifetime of both parents, be applied for the advancement of the appointee, unless such application is authorised by the appointment. To obviate this difficulty the power of appointment should authorise (see form in 2 K. & E. 474) the insertion in the instrument by which the power of appointment is exercised of a provision, overreaching the interests of the parents, for the advancement of the appointee. The same object may be effected by authorising, in the advancement clause itself, the application of "part of the share appointed to any issue" for its advancement.

Maintenance and accumulation.

(ϵ) The object of the maintenance and accumulation clauses is to enable the trustees, after the death of the husband and wife, to apply the income of the share to which each minor is presumptively entitled for its maintenance, and to accumulate the surplus. The sections of Lord Cranworth's Act (23 & 24 Vict. c. 145), which were intended to supply the place of these clauses, were repealed by the C. A. 1881, s. 71, and re-enacted in an amended form by s. 43, which enacts that "where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence

(*r*) See this view controverted in 38 Sol. J. 248.

of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance, or education, or not."

By sub-s. 2 the surplus income is to be accumulated by the trustees, and invested "on securities on which they are by the settlement, if any, or by law authorised to invest trust money," "for the benefit of the person who ultimately becomes entitled to the property from which the same arise," with power to apply the accumulations as if they were income arising during the current year. By sub-s. 3 the section is not to apply where a contrary intention is expressed in the instrument creating the trust (*s*), but it applies whether the instrument comes into operation after 1881, or before 1882.

The accumulations of income belong to the infant if it takes a vested interest, either absolute (*Re Humphreys* (1893), 3 Ch. 1) or subject to be divested (*Re Buckley*, 22 Ch. D. 583).

The cases where this section of the Act do not apply are discussed in 2 K. & E. 477.

The question if and when an express trust for maintenance should still be inserted is discussd *post*, p. 473.

Management of infant's land.

If the settlement comprises land, or there is a power to purchase land, the provisions of C. A. 1881, s. 42 (see *post*, p. 386) must be considered. This section authorises trustees, where an infant is beneficially entitled to the possession of land, to enter and continue in possession of the land, receive the rents, manage the property, maintain the infant out of the income, and accumulate the surplus income; but the destination of the accumulations differs from that of accumulations under s. 43. The section applies only to settlements after 1881, and does not apply

(*s*) See *Re Humphreys*, (1893) 3 Ch. 1.

where a contrary intention is expressed. There may be some doubt as to whether s. 42 applies to settlements by way of trust for sale; and it clearly does not apply to the case of an infant taking a contingent interest, as where the interests of the children vest at twenty-one, &c., in the usual manner; and in that case, s. 43 may be relied upon. If, however, the settlement comprises or may comprise land, it will, unless the interests of the children are contingent, be safer to insert express maintenance and accumulation clauses, or to state the destination of the accumulations so as to avoid the possible clashing of the two sections if both apply.

Protected life interest, modifications.

The trusts in favour of the children appear to require some slight modifications in the cases where the husband's interest is determinable on his bankruptcy, &c., and where there is added a discretionary trust in his favour (*ante*, p. 340).

Power of appointment.

As to the power of appointment: If the husband's life interest is made determinable on bankruptcy, &c., and the income after the determination of his life interest is to be held on the same trusts as if he were dead, the trusts for the children arise after the death of the wife and the determination, by death or otherwise, of the trusts declared in favour of the husband. There has been some difference of opinion as to whether in such a case the husband can, after the determination of his life interest, exercise the power of appointment in favour of the children so as to affect the interest of any child who has attained a vested interest (see *Wickham* v. *Wing*, 2 H. & M. 436; *Haswell* v. *Haswell*, 28 Beav. 26; S. C., 2 De G. F. & J. 456; *Re Aylwin*, L. R. 16 Eq. 585), but, subject to any expression to the contrary in the settlement, he probably can exercise it. To avoid any such question, a declaration should be inserted stating whether it is intended that the power should remain exerciseable by him after the determination of his life interest (2 K. & E. 475). It appears on the whole to be the better course to allow him to exercise the power, but not so as to diminish the share to which any

child has become entitled in possession in default of appointment. If there is a discretionary trust for the husband after the determination of his life interest, he can without doubt exercise his power after the determination.

Maintenance.

If the husband's interest is made determinable and there is no discretionary trust in his favour, it may be of importance to be able to maintain the infant children out of the income of the settled funds during the father's life after forfeiture of his life interest. It is therefore advisable not to rely on the statute but to insert an express maintenance clause. Where the maintenance clause is expressed in the form of a trust, the father may or may not, according to the words employed, be able to insist on the children being maintained in exoneration of his legal liability to maintain them. (*Mundy* v. *Earl Howe*, 4 Bro. C. C. 224; *Ransome* v. *Burgess*, L. R. 3 Eq. 773; *Wilson* v. *Turner*, 22 Ch. D. 521; *Re Bryant* (1894), 1 Ch. 324.) It is safer to add a declaration enabling the trustees to apply the income for maintenance without reference to the father's ability, where this is intended. Mr. Davidson suggests, on the other hand, that where it is not intended to exonerate the father from his liability, the clause should be made in the form of a power instead of a trust, so as to render it clear that the father has no claim to have the children maintained. Where the trustees have a discretion to maintain children without reference to the father's ability to do so, the Court will not interfere with their discretion where acted upon *bonâ fide*. *Brophy* v. *Bellamy*, L. R. 8 Ch. 798; *Re Lofthouse*, 29 Ch. D. 921.)

Advancement.

As to the power of advancement: Where there is a discretionary trust (the effect of which is not very different from an inalienable life interest) for the husband, the power of advancement ought to be made exercisable at all times during his lifetime with his consent. And there appears to be no valid reason against this course being adopted where there is no discretionary trust: for the husband will probably, in spite of his having encumbered his life interest or

being a bankrupt, be the most proper person to determine whether any, and what, advances should be made for the benefit of the children.

*Clauses of the Fourth Class* (*see ante*, p. 307).

Ultimate trusts of the husband's property;

The general rule is that, subject to the life interests of the husband and wife, and to the trusts for the issue of the marriage, property brought into settlement on the part of the husband is made to revert to him, so that he can dispose of his interest in his lifetime or by his will. The

of the wife's property.

wife's property is dealt with in a different manner; for, if it were given to her absolutely (subject to the prior interests of her husband and the issue of the marriage), it would be a reversionary chose in action, which would belong to the husband, if he were to survive her, on his taking out administration to her. For the purpose of avoiding this, the practice is to declare an ultimate trust (see form in Stud. Prec. 114) for such persons as the wife shall while discovert by deed, and whether covert or discovert by will appoint; and, in default of appointment, for the wife absolutely if she should survive the husband (thus giving her a chose in action which cannot by any possibility fall into possession during the coverture, and which, being given to her by her marriage settlement, cannot, if she was married before 1883, be disposed of by her under the Married Women's Reversionary Interests Act, 1857 (20 & 21 Vict. c. 57), with a restriction on anticipation if she was married after 1882, so as to prevent her from alienating it under the M. W. P. A. 1882 (see s. 19); but if she should die in his lifetime, for the persons who would have been entitled thereto according to the statutes for the distribution of the effects of intestates, if she had died possessed thereof intestate and *without ever having been married.* Sometimes the power of appointment is omitted; and sometimes the ultimate trust, in the case of the wife surviving, is declared for the persons who would have become entitled according

to the statutes; omitting the words "if she had died, &c.," the intention in either case being to ensure that the property, in default of issue of the marriage attaining vested interests, shall necessarily devolve on the statutory next of kin of the wife. If the property settled on the wife's behalf does not belong to her, the settlor can practically insist on any ultimate trusts that he thinks fit; but it is most improper to make the omissions above mentioned in a settlement of property belonging to the wife; for the effect of the omission of the power of appointment is to render it impossible for the wife to provide for her husband, a person who, after a long and blameless married life, has at least a moral claim on his wife as strong as that of her next of kin have, who may be very distant relations, and perhaps not on good terms with her. If the ultimate trust, in the case of the wife surviving, is for her next of kin, it may, in the absence of any power of appointment, prevent her from making any settlement of her own property on a second marriage, and she becomes poorer than if she had never been married. A solicitor who receives instructions to prepare on behalf of the lady a marriage settlement in the form above objected to must be very careful, if the lady is adult, to see that he receives the instructions from her personally, and that she fully understands what she is doing, and to warn her of her imprudence. If the lady is an infant, it appears hardly safe for a solicitor to settle on her behalf a draft in the form above objected to; for, in the possible event of the lady subsequently impeaching the settlement, he may be exposed to an action for negligence (*t*). Where instructions to prepare a settlement of this nature are laid before counsel, he should, if the lady be adult, call the attention of the solicitor to his duty on this point; but, if the lady be an infant, he may consider it his duty to decline to approve of the draft on her behalf (*u*). The reason why the power of appointment

(*t*) Consider *Clark* v. *Girdwood*, 7 Ch. D. 9.

(*u*) A very eminent conveyancer, whose pupil the author was, im-

given to the wife, in case she dies under coverture, is to be exercised by will, but not by deed, is that a will is always revocable, and that, therefore, whatever pressure may be put on the wife by the husband or his creditors to dispose of her property in their favour, she is unable during her husband's lifetime to dispose of the property irrevocably.

Effect of husband's death on wife's will made under the power of appointment.

Formerly the wife's power of appointment by will was made exercisable only in the event of her dying before the husband; so that the death of the husband in his wife's lifetime rendered her appointment void; for her will spoke from her death, at which time the power was not exercisable (*Noble* v. *Willock*, L. R. 8 Ch. 778). In all cases, therefore, where a wife has made a will under such a power, she ought to re-execute it, or, rather, to make a new will, immediately after her husband's death (*x*), but where the power is given to her whether she survives the husband or not, this is unnecessary.

"Next of kin."

In declaring the class who are to take under the ultimate trust in default of appointment by the wife, the phrase "next of kin" is sometimes used without adding a reference to the Statutes of Distribution. This is improper, as "next of kin" *simpliciter* means the nearest blood relations of the same degree; see M. L. P. P. 378; Interp. 304. Be careful also not to say "the persons who would be entitled thereto under the Statutes for the Distribution of the effects of intestates as if she had died *unmarried;*" it should be, "as if she had died *without ever having been married.*" For the words "die unmarried" are considered to mean in a marriage settlement "die a widow" (*y*), so that, while they exclude the husband, they do not exclude infant children surviving the wife. The share which any such child takes passes on its death under age to its adminstrator—*i.e.*, the

"Unmarried."

pressed on him the duty of protecting the interests of the lady, and of warning the solicitor as to his duty, in a case of this nature. —H. W. E.

(*x*) This is not affected by the M. W. P. A. 1893, s. 3.

(*y*) *Clarke* v. *Colls*, 9 H. L. C. 601. It does not necessarily bear this meaning in a will, *Dalrymple* v. *Hall*, 16 Ch. D. 715.

husband if he should survive it; so that if the words "die unmarried" be used, he might under the ultimate trust take the whole of the wife's property, to the exclusion of her relations. If the woman is a widow having children by a former husband, it is by no means clear whether they would be excluded by the ultimate trust in the usual form (*z*).

*Clauses of the Fifth Class* (*see ante*, p. 307).

These consist of—

(*a*) The power to appoint new trustees.

(*β*) The clauses for the indemnity and reimbursement of trustees.

The power to appoint new trustees.

(*a*) As it is possible that, before the trust funds are finally distributed, some of the trustees may die or wish to be discharged, it is necessary to have some means of appointing new trustees; for it is of very great importance to take care that the number of trustees should not fall as low as one, or that if it does, another should be appointed immediately; so as not to allow the trust funds to remain in the name of a sole trustee. The reasons are the following: The trustee is at law the absolute owner of the trust property; and in most cases he can, with very small risk of detection, sell it and apply the proceeds to his own use. This form of fraud is almost unknown so long as there is more than one trustee, as a trustee wishing to commit a fraud would seldom ask the other to concur with him.

Danger of trusting a sole trustee.

It is impossible to state too strongly the great danger of trusting a sole trustee, and the importance of not delaying the appointment of a new trustee when there is only one trustee left. Cases are unfortunately by no means uncommon in which a family has been ruined, or at least sustained very serious loss, by having trusted a sole trustee.

Stop order.

Where the trust moneys are invested in the public funds, or in a public company, whether incorporated or not,

(*z*) See 2 K. & E. 482.

security may be obtained by making and filing an affidavit under the Rules of the Supreme Court, 1883, Order XLVI., rr. 3 *et seq.*, and serving an office copy in manner provided in the Order on the Bank of England or the company; the effect of which is the same as if a writ of *distringas* had been duly issued under the Court of Chancery Act, 1841 (5 Vict. c. 5), s. 5, *i.e.*, to prevent the transfer of the stock or shares without eight days' notice to the solicitor in the matter (see 2 K. & E. 114).

The objection to this course is that it appears to imply suspicion of the trustees; so that it is never adopted in the case of a marriage settlement, except where the interest of the *cestui que trust* has been incumbered; in which case it is not unusual for the incumbrancer to adopt it.

In order to avoid frequent appointments of new trustees, the modern practice is to appoint three or four trustees originally. It is inconvenient to have more than four, as the Bank of England refuses to allow stock to stand in the names of more than four persons, in the absence of special circumstances.

Analysis of power.

The express power (see form in 2 K. & E. 518) to appoint new trustees contains four sub-clauses:—

1. The power of appointing the new trustees.

2. A declaration that on the appointment the number may be increased or diminished.

3. A direction for the transfer of the trust estate to the new and continuing trustees.

4. A declaration that any new trustee may act before the transfer is made.

1. The power of appointing a new trustee in the place of one dying, being abroad, or wishing to be discharged, or refusing or becoming incapable to act, was generally vested in the intended husband and wife, and the survivor of them, and after the death of such survivor, in the surviving or continuing trustees (with power to a retiring trustee to act for that purpose), or the executors or administrators of the last surviving or continuing trustee.

2. In the absence of the second sub-clause, the two following questions would arise on any attempt, prior to 1882, to exercise the power:—

What number of trustees should be appointed.

First, whether less than the original number might be appointed. The opinion of most conveyancers was that this was improper, and some thought that a title depending on such an appointment was bad. But in *Re Poole Bathurst's Estate*, 2 Sm. & G. 169, where two trustees had been appointed in the place of three, and in *Emmet* v. *Clark*, 3 Giff. 32, where three trustees were appointed in the place of four, a title depending on the appointment was forced on the purchaser. But if possible, the number was always filled up. This was, however, sometimes impracticable where the trusts were very complicated, or where it was impossible to find persons to supply all the vacancies. In such cases each new trustee was appointed in the place of one only of those who were dead, &c., leaving the other vacancies unsupplied, so that, if other persons were subsequently found to undertake the trusts, it would be possible to appoint new trustees to supply such vacancies, and thus fill up the number of original trustees.

Second, whether the original number of trustees might be increased. The rule (as laid down by Lord St. Leonards) was the following:—"If the power clearly requires that only one person shall be substituted in the place of another, of course it must be complied with. But under a power in the common form, or general in its terms, it seems, upon both principle and authority, that more than one person may be appointed to fill a vacancy by the death, &c., of one of the old trustees."

When the Court appointed trustees, it did not consider itself bound to appoint the original number.

3 & 4. The third sub-clause was merely directory; the fourth was originally inserted owing to the old doctrine, that a trustee could not act till the transfer had been completed; but this doctrine appears to be overruled. (See 3 Dav. Prec. 245; *Noble* v. *Meymott*, 14 Beav. 478).

Power to appoint new trustees under 23 & 24 Vict. c. 145.

By Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 27, it was provided that it should be lawful "for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust, if any, or if there be no such person or no such person able and willing to act then for the surviving or continuing trustees or trustee for the time being or the acting executors or executor, or administrators or administrator, of the last surviving and continuing trustee, or for the last retiring trustee, by writing to appoint any other person or persons to be a trustee or trustees in the place of" "any trustee . . . who shall die or desire to be discharged, or refuse or become unfit or incapable to act." The clause contained provisions similar to those in the third and fourth sub-clauses in the express power. In reliance on these provisions it became the practice to substitute for the full form a short clause supplementing the statutory provisions by nominating the persons by whom the power was to be exercised, and enabling the number of trustees to be augmented or reduced; though the full power was often inserted.

Power to appoint new trustees under the Trustee Act, 1893.

The C. A. 1881 (which repealed 23 & 24 Vict. c. 145, s. 27) contained provisions (s. 31) as to the appointment of new trustees, which were amended by the C. A. 1882, s. 5, and were extended by the S. L. A. 1890, s. 17, to trustees for the purposes of the S. L. Acts 1882 to 1890. These provisions have been repealed by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 51, and re-enacted (*a*) by s. 10, which provides that, unless the contrary is expressed in the instrument creating the trust, "the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing (*b*) trustees or trustee for the

(*a*) The Trustee Act, 1893 (s. 47), re-enacts the provisions of s. 17 of the S. L. A. 1890, as to trustees for the purposes of the S. L. Acts, 1882 to 1890.

(*b*) This includes a refusing or retiring trustee if willing to act in the execution of the provisions of Trustee Act, 1893, s. 10 (4), see note 1 K. & E. 101.

time being, or the personal representatives of the last surviving or continuing trustee (*c*), may by writing appoint another (*d*) person or other persons to be a trustee or trustees" in the place of any trustee (whether original or substituted, and whether appointed by a Court or otherwise) who is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts, or refuses or is unfit to act therein, or is incapable of acting therein. This power is similar to the usual form of express power, except that the latter usually had the words "be abroad" instead of "remain out of the United Kingdom for more than twelve months." The clause enables a new trustee to be appointed in the place of one who disclaims (*D'Adhemar* v. *Bertrand*, 35 Beav. 19), as being a trustee who "refuses to act"; or in the place of one who becomes bankrupt (*Re Barker*, 1 Ch. D. 43), as he is "unfit to act." It is the practice to vest the statutory power of appointing new trustees in the husband and wife and the survivor. (See Stud. Prec. 118 and further as to the appointment of new trustees the note in 1 K. & E. p. 99 *et seq.*)

On the appointment of new trustees the number may be increased (Trustee Act, 1893, s. 10, sub-s. 2, *a*); and it is not obligatory to appoint more than one trustee where only one was originally appointed, or to fill up the original number where more than two were originally appointed; but, except where only one was originally appointed, a trustee is not discharged under the section from his trust unless there will be at least two trustees to perform the trust (*ib.* sub-s. 2, *c*). On the appointment of a new trustee any assurance or thing requisite for vesting the trust property in the trustees jointly is to be executed or done (*ib.* sub-s. 2, *d*); and every new trustee appointed under the

(*c*) This includes the personal representative of a sole trustee (*Re Shafto*, 29 Ch. D. 247).

(*d*) The donee of the power cannot appoint himself: *Re Skeats*, 42 Ch. D. 522; *Re Newen* (1894), 2 Ch. 297.

section, as well before as after the trust property is vested in him, has the same powers, &c., and may act in all respects as if he had been an original trustee (*ib.* sub-s. 3). The section applies to trusts created either before or after the commencement of the Act (*ib.* sub-s. 6).

These provisions render it unnecessary to insert any provisions as to the appointment of new trustees, unless persons other than the statutory donees are to exercise the power: in which case it is necessary to supplement the statutory power by a short clause stating by whom it is to be exercised. It may still be advisable where the trust property consists of land, or mortgages on land, situated in a foreign country in which there is no law to the effect of the above provisions of the Trustee Act, 1893, to insert the express power.

Separate sets of trustees.

The Trustee Act, 1893 (re-enacting s. 5 of the C. A. 1882), provides (s. 10, sub-s. 2, *b*) for the appointment of a separate set of trustees for any part of the trust property held on trusts distinct from those relating to any other parts.

Statutory power to retire.

The Trustee Act, 1893, s. 11 (re-enacting the C. A. 1881, s. 32), provides that, unless a contrary intention is expressed in the instrument creating the trust, where there are more than two trustees, one of them may retire without any new trustee being appointed in his place, if by deed he declares his desire to retire, and his co-trustees and the person, if any, empowered to appoint new trustees by deed consent to his discharge. This section applies to trusts created either before or after the commencement of the Act.

Vesting declaration of trust property.

The Trustee Act, 1893, s. 12 (re-enacting the C. A. 1881, s. 34), enables the person appointing a new trustee, by declaration contained in the deed by which the new trustee is appointed, to vest "any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject" in "the persons who by virtue of the

deed become and are the trustees for performing the trust" as joint tenants; and (by sub-s. 2) a similar provision is made for vesting the trust property on the retirement of one trustee (under s. 11) by the declaration of the retiring and continuing trustees, and the person, if any, empowered to appoint trustees; but (sub-s. 3) the section does not extend to "any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament." This section only applies to deeds executed after 1881.

Indemnity and reimbursement of trustees.

($\beta$). The express clause for the indemnity and reimbursement of trustees contains the following sub-clauses:—

1. A declaration that the trustees shall be chargeable only for such trust funds as they actually receive, notwithstanding their signing any receipts for the sake of conformity.

2. That each of them shall only be answerable for his own acts and defaults.

3. That no trustee shall be liable for lending money on or purchasing hereditaments with less than a marketable title, or for the insufficiency in title or deficiency in value of any investment, or for any other loss, unless the same happens through his wilful default.

4. A power to the trustee to pay all expenses incurred by him on or about the execution of his trusts and powers out of the trust property.

The first two and the fourth of these sub-clauses are now supplied by s. 24 of the Trustee Act, 1893 (re-enacting the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 31. As to the third, trustees are protected who dispense with the investigation of the lessor's title on the purchase (V. & P. A., 1874, s. 2) or on lending on mortgage (Trustee Act, 1893, s. 8 (2)) of leaseholds or with the investigation of the under-lessor's title on the purchase

of an under-lease (C. A. 1881, s. 3 (1) ). The Trustee Act, 1893 (re-enacting 22 & 23 Vict. c. 35, s. 31, and Trustee Act, 1888, s. 4), provides (s. 24) to the effect of the latter part of the third sub-clause set out above.

Solicitor trustee.

Having regard to the rule of Equity that no trustee is allowed any recompense in respect of the time and trouble that he expends in the execution of the trust, it follows that a solicitor who is a trustee and acts as solicitor to the trust is not allowed more than costs out of pocket; but it is a usual and convenient practice in cases where a solicitor is appointed trustee to introduce a provision (see form in 2 K. & E. 521) authorising him to receive remuneration just as if he had not been so appointed. (*Broughton* v. *Broughton*, 5 De G. M. and G. 160; 2 W. & T. L. C., note to *Robinson* v. *Pett*. As to non-professional services, see *Harbin* v. *Darby*, 28 Beav. 325; *Re Ames*, 25 Ch. D. 72; *Re Chapple*, 27 Ch. D. 584; *Re Fish* (1893), 2 Ch. 413.

## PART II.—STRICT SETTLEMENTS.

It is proposed to treat the subject of strict settlements more briefly than its importance deserves, and this for two reasons: *first*, the discussion of all the points likely to arise in the preparation of a strict settlement would require a treatise for itself; and, *second*, it is unlikely that the beginner will have to prepare one. Therefore, only a few of the more obvious questions which arise will be dealt with, and the student is referred to the works of Davidson, Peachey, and Vaizey for a fuller discussion.

Object of strict settlement.

In the most simple case (the only one discussed here), where the intended husband is absolutely entitled to the property, the object of a marriage settlement of real property in the ordinary form, commonly called a *strict settlement*, is to keep the property in the family, charged with some provisions for the wife and for those children who do not succeed to it. This is effected as follows: *First*, by securing the payment to the wife of two annuities—the one, payable during her husband's lifetime, called "Pin-money;"

the other, payable after his death, called a "Jointure." *Secondly*, by providing for the payment of gross sums of money, called "Portions," to such of the younger children of the marriage as attain their majority. *Thirdly*, by providing that the property, charged with these provisions for the wife and younger children, shall go as a whole after the death of the husband to the eldest son.

Analysis of strict settlement before 1882.

Here follows an analysis of a strict settlement made prior to 1882 of the husband's property on his marriage when he was seised in fee. The clauses which, if the settlement is made after 1881, may be omitted or modified in reliance on the C. A. 1881, are printed in italics. An analysis of the same settlement made after 1882, in reliance on the provisions of the S. L. Acts 1882 to 1890, is given *post*, p. 429.

Parties: (1) A. B. (*intended husband*); (2) C. D. (*intended wife*); (3) P. T. and Q. T. (*trustees of powers*); (4) P. M. and Q. M. *trustees of pin-money term*); (5) K. J. and L. J. (*trustees of jointure term*); (6) M. P. and N. P. (*trustees of portions terms*).

Recitals:

(1.) The intended marriage.

(2.) Narrative recitals where necessary, showing the state of the title.

(3.) Agreement for settlement.

Operative clauses:

1. Grant by A. B. to P. T. and Q. T.
2. Parcels (*general words, all estate*).
3. Habendum to P. T. and Q. T. "and their heirs"; to the use of "A. B. and his heirs until the said intended marriage; and afterwards"
4. *To the use of P. M. and Q. M. for 99 years (the pin-money term*; see *post*, p. 368).
5. To the use of A. B. for life; see *post*, p. 373.
6. To the use that C. D. shall receive an annuity for her jointure (*secured by powers of distress and entry*); see *post*, p. 372.

7. *To the use of K. J. and L. J. for* 200 *years* (*the jointure term*); see *post*, p. 373.
8. To the use of M. P. and N. P. for 1,000 years (the portions term); see *post*, p. 376.
9. To the use of the sons of the marriage successively in tail, *using the words*, "*heirs of the body*:"
10. To the use of the daughters of the marriage as tenants in common in tail, *using the words*, "*heirs of the body*," with cross remainders between them; see *post*, p. 384.
11. To the use of A. B. in fee-simple, *using the words*, "*his heirs and assigns for ever*."
12. *Trusts of the pin-money term*; see *post*, p. 370.
13. *Trusts of jointure term*; see *post*, p. 372.
14. Trusts of the portions term, with the auxiliary trusts and powers; see *post*, p. 380.
15. Power to husband to jointure a future wife; see *post*, p. 385.
16. Power to husband to charge portions for the children of a future marriage; see *post*, p. 386.
17. *Declaration as to receipt and application of rents during minorities*; see *post*, p. 387.
18. Powers of leasing and of accepting surrenders of leases; see *post*, p. 393.
19. Power to grant licences to copyholders; see *post*, p. 396.
20. Power of enfranchisement: see *post*, p. 397.
21. Powers of sale and exchange, and, if necessary, of raising money on mortgage with auxiliary trusts; see *post*, p. 397.
22. Covenant to surrender copyholds to the use of P. T. and Q. T. upon trusts corresponding with uses of freeholds; see *post*, p. 400.
23. Assignment of leaseholds to P. T. and Q. T. upon trusts corresponding, as nearly as the nature of the property admits, with uses of freeholds; see *post*, p. 400.
24. Assignment and trusts of heirlooms; see *post*, p. 401.

25. *Receipt clause.*
26. *Power to appoint new trustees.*
27. Clause supplemental to statutory provisions for indemnity of trustees.
28. *Covenants for title.*

Different sets of trustees, whether necessary.

It has been the practice to appoint different sets of trustees of the powers and of the several terms; probably under the idea that the powers which had to be exercised for the benefit of the estate, *i.e.*, of the husband and eldest son, could not with propriety be vested in persons such as the trustees of the pin-money, jointure, and portions terms, whose duty it was to protect the interests of the wife and younger children. But there is really no conflict of interests, for the better the estate is managed the greater security will the wife and younger children have for pin-money, jointure, and portions. Formerly there was another reason for appointing different sets of trustees of the terms, namely, that where two terms, or a term and an estate of freehold, were limited in immediate succession to the same trustees, merger took place; but this is obviated by the Judicature Act, 1873, s. 25 (4). It is now the usual practice to have only one set of trustees, though occasionally there are two sets, one for the powers and the other for the terms. There is, however, no objection to having different sets of trustees for the powers and for each term according to the old practice, if the parties so desire.

Covenants for title.

It was formerly the practice to insert in a settlement on marriage full covenants for title, as on a sale; but this is inconvenient, and it is now the practice to omit the covenants and to imply a covenant for further assurance by the settlor conveying "as settlor" (*ante*, p. 311).

It will only be necessary to consider some of the operative clauses.

Consideration.

1. The grant is expressed to be made "in consideration of the said intended marriage and in pursuance of the said recited agreement."

Parcels.

2. It often happens that the title is not investigated very

strictly; so that possibly some part of the property intended to be settled may be omitted in the particular description of the parcels. To guard against this, a few sweeping words are often inserted for the purpose of conveying all the settlor's property in certain counties or parishes (*Moore* v. *Magrath*, 1 Cowp. 12). Where this is done, care should be taken not to restrict by the recitals the generality of the description in the operative part (*d*).

Terms used for securing annuities and gross sums.

4. At law a limitation of a term of years, immediately preceding any limitation of an estate of freehold, has no effect on the seisin of the freeholder; but the termor has the right to the rents and profits of the land during his term; and, if he be made unimpeachable of waste, he can cut timber, open mines, &c. For these reasons, when an annuity or a gross sum of money is intended to be charged on the settled property, the usual and convenient practice is to limit a term to trustees upon trust "out of the rents and profits, or by the sale of timber or minerals, or by mortgage of the same premises, or any of them, for all or any part of the term, or by all or any of the ways and means aforesaid, or by any other reasonable ways or means," to raise the annuity or gross sum and their costs (see form in 2 K. & E. 664). The trustees are also directed to "permit the person or persons for the time being entitled in reversion immediately expectant on the said term to the said premises therein comprised, to receive the surplus of the rents and profits of the same premises." (See form in 2 K. & E. 597). Where there are several terms in the same instrument, it is convenient, instead of inserting this provision in the case of each term, to insert a similar provision applicable to the surplus rent of all the terms. Formerly, a proviso was inserted for the cesser of the term as soon as the trusts were fulfilled; but this is now unnecessary, owing to the provisions of the Satisfied Terms Act, 1845 (8 & 9 Vict. c. 112).

(*d*) It must be seen no advowson is settled unless twelve months have elapsed since the last institution or admission to the benefice, 61 & 62 Vict. c. 48, s. 1 (1); see 1 K. & E. 926.

Where an annuity is secured in this manner, it is rarely necessary for the annuitant to call on the trustees to act; for it is to the advantage of the person in possession to keep down the annuity, so that he may not be disturbed in the possession of the land. The practice of securing an annuity by means of a term has become less common than it was formerly, for the limitation of a rent-charge (see form in 2 K. & E. 584) is shorter than the declaration of the trusts of a term, and it is now unnecessary to set out the powers of distress and entry (*post* p. 373). Annuity.

Where the object of the term is to provide for the raising of a gross sum of money, this is carried out by means of a mortgage by the trustees of the term. The power of sale given to mortgagees by the C. A. 1881, s. 19, will apply to a mortgage by trustees unless expressly excluded by the mortgage. As the tenant for life in possession is bound, as between himself and the remainderman, to keep down the interest on any charge bearing interest (*ante*, p. 145), he is generally willing to concur in the mortgage for the purpose of covenanting with the mortgagee to pay the interest accruing due during his life. Occasionally he is willing to covenant to pay the principal; and when he does so, it should be provided that, as between himself and the mortgaged property, the latter should primarily bear the debt, but that the mortgagee should not be affected by the proviso. It is generally desirable to insert a power of raising the sum secured by a term by a mortgage of the inheritance (see 2 K. & E. 633). Gross sum.

Where it is intended that the payment of an annuity during the lifetime of the tenant for life shall be secured by a term, the term is made prior to his estate for life, so that he is entitled to the possession of the estate, subject to the obligation of paying the annuity. If it be intended that an annuity or gross sum, such as a jointure or portions, shall become payable after his death, the term is limited in remainder after his life estate; so that the tenant in tail is entitled to possession, subject to the charges being paid. The position of the limitation of the term.

Care must be taken not to make the limitation of the term subsequent to the estate tail, for in that case the charges could not be raised during the existence of the estate tail, and the tenant in tail could, by executing a disentailing assurance (the effect of which would be to enlarge his estate tail into an estate in fee simple), destroy the term, and prevent the money intended to be secured by it from ever being raised. See as to the methods of giving additional portions to daughters on failure of sons, 3 Dav. Prec. 1053, 1079.

Pin-money.

The object of pin-money is to provide an income for the wife during the joint lives of herself and her husband, to be applied by her for her own private purposes, such as dress, &c. But, having regard to the importance of making an inalienable provision for the support of the family, it is a matter for consideration in some cases, whether the income so secured to the wife might not with advantage be made larger than is necessary for these purposes. It is suggested that, where such a course is adopted, the amount of the pin-money might, within fixed limits, be left in the discretion of the trustees from time to time. Where the pin-money is secured by a term, the term is limited to the trustees to commence from the marriage, "upon the trusts, &c., hereinafter declared, &c., concerning the same." The statement of the limitations is not interrupted for the sake of declaring the trusts of the term. In a subsequent clause, the 12th (*ante* p. 366), the trusts of the term are declared to be to raise an annuity of £—— during the joint lives of the husband and wife and to pay it to the wife "by way of pin-money without power of anticipation," to be considered as accruing from day to day (*ante*, p. 320), but to be payable quarterly. Having regard to the provisions of the M. W. P. A. 1882, it is unnecessary in deeds after 1882 to limit the term for securing the pin-money to trustees, for it can be safely limited to the wife herself; but, having regard to the provisions of the C. A. 1881, s. 44, it is better to limit a rent-charge to the wife during her life, commencing

As to dispensing with term.

from the marriage, for her separate use, without power of anticipation. See form in 2 K. & E. 584; Stud. Prec. 87, and, as to the remedies of the owner of a rent-charge, *post*, p. 373.

Estate for life.

5. The life estate of the husband is usually made "without impeachment of waste." See the rights of a tenant for life as to committing waste discussed, Tud. L. C. R. P., note to *Lewis Bowles' Case*, and 3 Dav. Prec. 279 *et seq.*; as to permissive waste, see M. L. R. P. 44, and, as to equitable waste, the Judicature Act, 1873, s. 25 (3); M. L. R. P. 46.

Power of cutting timber.

Where a tenant for life is impeachable for waste, he may, whether the settlement was made after 1882 or not, with the consent of the trustees or an order of Court, cut and sell timber ripe for cutting; but three-fourths of the proceeds are to be set aside as capital money, and the other fourth to go as rents and profits; S. L. A., 1882, s. 35.

Power of working mines.

A tenant for life who is impeachable for waste may work open mines, but he cannot open new mines; *Clavering* v. *Clavering*, 2 P. W. 388; *Viner* v. *Vaughan*, 2 Beav. 466; *Bagot* v. *Bagot*, 32 Beav. 509. See 3 Dav. Prec. 286.

Permissive waste.

There appears to be no remedy against a tenant for life for mere permissive waste by allowing property to fall out of repair (*Powys* v. *Blagrave*, Kay 495, 4 De G. M. & G. 448; *Warren* v. *Rudall*, 1 J. & H. 1; *Greene* v. *Cole*, 2 Saund. 228; *Herne* v. *Bembow*, 4 Taun. 764; *Re Cartwright*, 41 Ch. D. 532), unless he has contracted or is expressly bound to keep it in repair (*Re Skingley*, 3 Mac. & G. 221; *Woodhouse* v. *Walker*, 5 Q. B. D. 404, cited in M. L. R. P. 44; and therefore, if it is intended that the tenant for life should keep houses, &c., in repair, an express statement to that effect should be inserted in the settlement.

Wife's estate for life.

In a settlement before 1883, if the wife took the first life interest, it was the practice to limit a term to trustees during the joint lives of herself and her husband, or for a term of years determinable on the death of either, upon trusts which in effect vested in the wife the sole management

of the property, and subjected the rents and profits to a trust for her separate use with a restraint on anticipation.

It has become the practice, in strict settlements made after 1882, if the wife takes the first life interest, to give it directly to her without the intervention of a trustee. But it appears to be doubtful, having regard to the M. W. P. A. 1882, s. 19, whether this is correct; for the effect may be to give the legal estate to the husband during the joint lives of himself and his wife, and, unless the property is expressly given to the wife for her separate use, the husband may take it beneficially.

Frame of limitation of jointure rent-charge.

6. In deeds before 1882 the limitation of the jointure rent-charge consisted of three clauses: by the *first* of which the annuity was limited in full for the intended wife's jointure and in bar of all dower and free-bench, words which are inserted for the sake of indicating clearly that the jointure is to bar the wife's dower (Stat. Uses, ss. 6 to 9), and also to bar in Equity her free-bench, which, as copyholds are not within the statute, was not barred at law; by the *second*, a power of distress was limited to the jointress in case of the jointure being in arrear for twenty-one days; and by the *third*, a power was given to her, in case of the jointure being in arrear for forty days, to enter and take the rents and profits until the arrears of her jointure and her costs were satisfied. The jointure was also collaterally secured by a term limited to trustees; or, occasionally, no term was limited, but power was given to the jointress, or her executors or administrators after her death, to limit it.

Rent-service.

Before the statute of *Quia Emptores* (18 Edw. 1, c. 1), if a man (Co. Lit. 143 *a*) made a feoffment in fee simple, with or without a deed, he might reserve to himself and his heirs a rent in fee simple. This would be "rent-service," for the feoffee would hold his land of the feoffor by the service (*inter alia*) of paying the rent; and, if he neglected to do so, the feoffor might distrain of common right. After the statute no service could be reserved on parting with the fee, because there is no tenure between the parties; but, if an alienation be made by deed, and by the same deed the

feoffor or grantor reserves rent, with power to distrain in case of non-payment, the rent is called a *rent-charge* (Co. Lit. 143 *b*), because the land is charged with it, and by virtue of the deed it can be distrained for. If the clause of distress be omitted, the rent is a mere "rent-seck," that is, rent for the recovery of which there is no power of distress, either by the rules of Common Law, or by the agreement of the parties. A power of distress is given by the Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28) s. 5, to the owners of rent-seck. Although the effect of this statute was to render it, strictly speaking, unnecessary to insert a power of distress when a rent is created, it was invariably inserted in deeds before 1882, except where it was reserved on the creation of a term, or where the rent-charge was created for the purpose of qualifying a man to vote (2 & 3 Will. 4, c. 88: see 48 Vict. c. 3, s. 4), or to hold some office, such as the office of a magistrate (18 Geo. 2, c. 20). (*Dodds* v. *Thompson*, L. R. 1 C. P. 133) (*e*).

Rent-charge.

Rent-seck.

The C. A. 1881, s. 44, confers on any person entitled, under an instrument coming into operation after 1881, to "receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion," subject to all prior interests, the remedies following "as far as they might have been conferred by the instrument under which the annual sum arises," unless a contrary intention is expressed therein: namely, a power of distress on non-payment of the annuity for twenty-one days, a power of entry on non-payment of the annuity for forty days, and a power to limit a term to secure the annuity. In reliance on these provisions it is now the practice to omit the powers of distress and entry and the term for securing a rent-charge.

Powers of distress and entry under C. A. 1881.

The power of distress cannot be exercised over lands

Term for securing.

(*e*) As to Rents, see Leake, Us. and Prof. of Land, ch. iii. pp. 372 *et seq.*

Rent-charge.

subject to leases, either in existence at the time when the settlement was made or made afterwards by virtue of the powers contained in the settlement or conferred by statute; for in either case, the title of the lessee is paramount to the rent-charge. The lessee is, however, bound to pay his rent to the legal reversioner. Hence arose the practice of securing a jointure or other rent-charge by a term vested in trustees. If the rent-charge is not paid, the trustees of a term limited in the settlement, or of a term created under a power contained in the settlement or under the power conferred by the C. A. 1881, s. 44, can force the tenants to pay their rents to them, as being the assignees of the reversion expectant on the determination of the leases created before the settlement, and as being the reversioners expectant on the determination of leases created since the settlement under the powers contained in the settlement or conferred by statute.

Jointure rent-charge not inalienable.

A jointure rent-charge is not inalienable during the coverture, for it is an interest in land; so that, if it was created before 1883, the married woman and her husband can convey it by deed acknowledged under the Fines and Recoveries Act, s. 77; and, if it was created after 1882, it can be conveyed by the married woman alone under the provisions of the M. W. P. A. 1882. Thus the position of a wife for whom provision after her husband's death is made by a jointure appears to be less secure than that of a wife for whom provision is made by a marriage settlement of personalty. Advantage may, however, sometimes be taken, for the wife's benefit, of her power of alienation. Suppose a case where the jointure is secured on an estate to which the husband is entitled in fee simple subject to the jointure. The husband wishes to mortgage the estate, and the intending mortgagees require the wife's concurrence, so that the mortgage may be free from the jointure. She may stipulate that, in consideration of letting n the mortgage before the jointure, a fresh jointure of larger amount, subject to the mortgage, shall be given to her; or that some provision shall be made for her children; and, in either case the

release of her jointure would be a sufficient consideration to support the transaction. In deeds made after 1882 it is, however, becoming the practice to give the jointure to the wife for her separate use and to restrain her from anticipating it (see form in 2 K. & E. 585), so as to render it inalienable during coverture (*ante*, p. 335) without an order of the Court, under the C. A. 1881, s. 39.

"Without any deduction."

The jointure is always made payable "without any deduction," words which require explanation. Although the owner of a jointure rent-charge does not appear to be liable to pay any rate or local assessment in respect of it, she is liable to pay income tax on the jointure and to contribute towards the land tax payable in respect of the land out of which it issues (*f*), and, unless the settlement was made by her husband or herself, she is liable to succession duty (*g*), and since the 1st of August, 1894, unless the settlement was made by herself to estate duty (*h*). The estate duty is calculated as follows: she must be treated as tenant for life of a sum equivalent to the capitalised value of the jointure, to be ascertained at the same number of years' purchase as that at which the estate as a whole was capitalised for the purpose of duty; but she is entitled to throw the duty on the corpus on the terms of paying interest during her life to the tenant for life, or in tail or fee simple in possession, at the rate actually paid to the Commissioners of Inland Revenue until actual payment of the duty, and afterwards at the rate at which the duty could be raised on mortgage of the land: *Re Parker-Jervis*, (1898) 2 Ch. 643.

If the charge is made payable "without any deduction in respect of any tax," it is payable free from succession duty. (*Floyer* v. *Bankes*, 3 De G. J. & S. 306; compare *Re Higgins*, 29 Ch. D. 697; 31 Ch. D. 142); and from estate

(*f*) The jointure rent-charge is liable to contribute towards land tax under the Land Tax Act, 1798 (38 Geo. 3, c. 5).

(*g*) 16 & 17 Vict. c. 51.

(*h*) If estate duty is payable, the property is not chargeable with the 1 per cent. succession duty, or the additional succession duties under s. 21 of the Customs and Inland Revenue Act, 1888; Finance Act, 1894, s. 1.

duty, *Re Parker-Jervis*, (1898) 2 Ch. 643; but not from settlement estate duty payable under the settlement itself; *Re Maryon-Wilson*, (1899) 2 Ch. 489. In each case the duty is payable out of the land.

Income tax.

Though by settlement or will a jointure may be given of such an amount as, after deduction of income tax, will leave a specified sum (2 Dav. Prec. pt. ii. 20, note), yet a direction that the jointure shall be payable free from income tax is void if contained in a settlement (*Attorney-General* v. *Shield*, 3 H. & N. 834: not so as to a will, *Re Bannerman*, 21 Ch. D. 105). It is a question, sometimes of difficulty, on the construction of a will, whether the annuity is given free from income tax or not. The cases appear to have established that, where a testator gives an annuity and then directs it to be paid free from all deductions in respect of any taxes, so that the word "deduction" is associated with "tax," the annuity is payable free from tax (*i*); but that, if the annuity is given "free from all deductions," the tax is payable by the annuitant; because income tax is not properly a deduction (*k*).

8. The object of the portions term is to make a provision for those children who do not succeed to the estate. In considering the method of framing it the following rules of interpretation must be borne in mind:—

General rules of construction (*l*).

(*a*) If a portion or legacy payable out of land is made payable (*m*) at a certain age, or on marriage, or other event personal to the person to be benefited, and such person die before that time arrive, the portion or legacy is not to be raised out of the land. (*Poulet* v. *Poulet*, 1 Vern. 204; *Chandos* v. *Talbot*, 2 P. Wms. 601.)

(*i*) *Turner* v. *Mullineux*, 1 J. & H. 334; *Festing* v. *Taylor*, 3 B. & S. 217; *Lord Lovat* v. *Duchess of Leeds*, 2 Drew. & Sm. 62; *Re Bannerman*, 21 Ch. D. 105; *Peareth* v. *Marriott*, 22 Ch. D. 182; *Re Buckle* (1894), 1 Ch. 286.

(*k*) *Lethbridge* v. *Thurlow*, 15 Beav. 334; *Abadam* v. *Abadam*, 33 Beav. 475; *Sadler* v. *Richards*, 4 K. & J. 302; *Gleadow* v. *Leetham*, 22 Ch. D. 269.

(*l*) See Interp. chap. xxvi., p. 367; 2 Vaizey on Settlements, 1101 *et seq.*

(*m*) See *post*, p. 450.

(β) If the payment be postponed until the happening of an event not referable to the person to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid, such as the death of the tenant for life, then it will be raisable after the death of the tenant for life, although the term out of which it was to be raised had not arisen during the life of the person to be benefited owing to his death during the life of the tenant for life. (*Evans* v. *Scott*, 1 H. L. C. 57; *Remnant* v. *Hood*, 2 De G. F. & J. 396.)

(γ) When portions are charged on land by a person *in loco parentis*, either by will (*Jackson* v. *Dover*, 2 H. & M. 209) or settlement, and the instrument is ambiguously expressed, or if it contains conflicting and contradictory clauses, so as to leave uncertain the period at which, or the contingency upon which the portions are to vest, the Court leans strongly towards the construction which gives a vested interest to a child at a time when it stands in need of a provision, usually as to sons at the age of twenty-one, and as to daughters at that age or marriage. (*Howgrave* v. *Cartier*, 3 V. & B. 85; *Re Hamlet*, 39 Ch. D. 426.)

(δ) A trust to raise portions out of "the rents and profits" of land charges them on the corpus, unless the context shows that annual rents and profits alone are meant.

Definition of portionists—"younger children" (*n*).

The definition of the children for whom portions are to be provided, commonly called "younger children," varies slightly in the different forms. Every child who, though not originally entitled to the first estate tail, becomes, if a son (*n*), entitled to it before attaining twenty-one, or if a daughter, and the daughters take successive estates tail, becomes indefeasibly (*ante*, p. 347) entitled to it before attaining twenty-one or marrying, should be excluded.

(*n*) As to the meaning of "younger children," see Interp. chap. xxiv. p. 337.

(See form in 2 K. & E. 594.) Such a provision will not be held to exclude a child who, though becoming eldest in its father's lifetime, is prevented from succeeding to the bulk of the estates by a disentailing assurance executed by its father and elder brother (*o*). It is convenient to include any child who, being a son, attains twenty-one, or, being a daughter, attains twenty-one or marries, in its father's lifetime, at a time when it is not entitled or indefeasibly entitled to the first estate tail, although it may afterwards in the father's lifetime become so entitled; for, if this is not done, it is difficult to make a settlement on the marriage of the child in the father's lifetime.

Where there are cross limitations in tail between the daughters, it appears to be immaterial whether they are to have portions or not in the event of their succeeding to the estate, unless there are subsequent limitations to collaterals.

Amount raisable.

The total amount raisable for portions is generally made to depend upon the number of children who in the event become entitled to portions. Care should be taken not to fix this amount too large as compared with the value of the estate after deducting prior encumbrances; and it should be remembered that the costs of raising the portions are payable out of the estate. (*Michell* v. *Michell*, 4 Beav. 549.) Where the limitations to collaterals precede the limitations to the daughters of the tenant for life, the portions are often made larger in the event of his having no son who succeeds to the estate. See 3 Dav. Prec. 1053, note.

When payable.

Although the portions are made to vest in the children at twenty-one, &c. (as above defined), they are made payable either at the death of the tenant for life, or when they become vested, whichever event happens last; but power is given to the tenant for life to require them to be raised and paid during his lifetime.

Portions provided for by insurance.

It was suggested by the late Mr. Twopenny (3 Dav. Prec. 458) that, where the prior charges are heavy, it would

(*o*) *Macoubrey* v. *Jones*, 2 K. & J. 684; *Collingwood* v. *Stanhope*, L. R. 4 H. L. 43. Distinguish *Re Fitzgerald* (1891), 3 Ch. 394.

be desirable that the payment of the portions should be collaterally secured by an insurance on the life of the tenant for life: but, as the portions are in effect a charge on the inheritance, though secured by a term only, it appears convenient, instead of appropriating the policy moneys to the payment of the portions, to declare that they shall be held on the same trusts as if they had arisen under a sale of the inheritance, so as to enable them to be applied in the discharge of any incumbrances which it may be most convenient to discharge.

Is the receipt of trustees sufficient to discharge a mortgagee?

It will be observed that the trusts of the portions term contain no receipt clause. This was omitted before the statutes supplying the absence of a receipt clause came into operation: so that the mortgagee advancing money on a mortgage under the power, was obliged to see to the application of his money; that is, in other words, he could pay it only on the receipt of the persons entitled to the portions. The practice of causing those persons to join in a mortgage for raising portions for the purpose of giving a receipt has continued to the present day; but if for any reason it is impossible to make them parties, the money actually raisable may be safely paid by the mortgagee on the receipt of the trustees alone.

Can the whole of the portions be raised where some only are due?

It is convenient for the owner of the estate to have the total sum that can be required for portions raised as soon as the first portion becomes payable, for otherwise the trustees may be obliged to make as many mortgages as there are portions. It appears very doubtful whether, until all the portionists are entitled to payment and are competent to give receipts, the whole of the portions can be raised in the absence of an express power (*p*), which accordingly is generally inserted. (See form in 2 K. and E. 596.)

Trusts of portions term.

The trusts of the portions term may conveniently be considered as divided into three parts, the *first*, stating in what

(*p*) See on this question *Sheppard* v. *Wilson*, 4 Ha. 392; *Gillibrand* v. *Goold*, 5 Sim. 149; *Leech* v. *Leech*, 2 Dr. & War. 568; 2 Vaizey on Settlements, 1123.

events and to what amounts portions are to be raised; the *second*, stating the trusts on which the portions are to be held (which trusts bear a striking resemblance to the ordinary trusts in a settlement of personalty); and the *third*, making provisions for the maintenance and advancement of the children presumptively entitled to the portions. We give an analysis of the trusts of the portions term as in 2 K. & E. 593; and it will be a useful exercise for the student to compare this with the forms in 3 Dav. Prec. 988, 1046.

(α) A direction to raise after the husband's death, or in his life at his request, a sum either fixed in amount or varying with the number of "younger children" (who are defined)

(β) Power of appointment by the husband among the younger children and their issue; and, in default, trusts for the younger children.

(γ) Hotchpot clause.

(δ) Maintenance clause. This is effected by a direction to the trustees to raise after the death of the husband an annual sum not exceeding interest at 4 per cent. on the expectant portion of any child and to apply it for its maintenance.

(ε) Power to the trustees to raise a sum for the advancement of any child prospectively entitled to a portion.

(ζ) Provision as to events in which advances are to be considered as part of portions. It will be observed that, when the amount raisable for portions depends upon the number of younger children, the amount to which the children are entitled in expectancy for portions at a time when the advance is made may, owing to the death either of the eldest son or of some of the children entitled in expectancy to portions, exceed the total amount in the event raisable for portions; and the result of advances being made might be to leave some of the children without any provision at all. An example will render

this more clear. Suppose the amount raisable for portions to be £15,000 if there is only one child, £30,000 if two or three children, and £40,000 if four or more. At a time when there are eight younger children, let six of them be advanced to the full amount: these six are entitled in expectancy to six-eighths of £40,000 or £30,000, one-half of which is £15,000. Now suppose that only one child lives to be entitled to a portion, and that he has received no share of the advance. The total amount raisable in the event would be £15,000, a sum exactly equal to the advance, so that if the advance was to be counted as part of the sum raisable, this child would get nothing. To avoid this it is provided that an advance shall be taken into account only if the child who is advanced becomes ultimately entitled to a portion; or if the sum advanced together with the amount payable for portions, if no advance had been made, would exceed the maximum sum.

($\eta$) Power to raise the total sum that may be required before all the portions are payable, and trusts of the monies so raised. The object of this is to render it unnecessary to make as many mortgages as there are portions (*ante*, p. 379).

($\theta$) Provision as to costs of trustees and as to receipt of rents and profits by the reversioner (*ante*, p. 368).

Limitation of estates tail.

9. By the C. A. 1881, s. 51, an estate in tail or in tail male may be limited in a deed after 1881, by the use of the words "in tail" or "in tail male," without the words "heirs of the body," or "heirs male of the body." If this form is used, the subsequent limitations will be introduced by the words "with remainder," instead of the words "in default of such issue."

This provision applies only to deeds; so that a surrender of copyholds must be made in the same words as would have been required by the custom of the manor before 1882.

Contingent remainders (*q*).

The student will observe that, if the limitations contained in a marriage settlement are to the use of A., the intended husband, for life, with remainder to the use of his eldest son in tail, the remainder is, at the time of its creation, contingent; it is not ready to come into possession on the determination of A.'s life estate; for A. may die before a son is born or *en ventre sa mère*. The instant that any son is born, his remainder becomes vested; for it then becomes ready to come into possession on the determination of the prior estate. Till lately, the fact of the son's remainder being contingent had an important bearing on the frame of the settlement; for, suppose the common case of limitations to A., an unmarried man, for life, remainder to his first and other sons in tail, remainder to C., in fee; then if A., before he had a son begotten, had conveyed his life estate to C., it would have merged in the fee, and the contingent remainders limited to the sons would have failed for want of any particular estate to support them. To prevent this catastrophe, it was the custom to insert a limitation, as follows:—"And after the determination of A.'s estate, by any means, in his lifetime, to the use of [*trustees*] and their heirs during the life of A. upon trust to support the contingent remainders hereinafter limited." (See, as to this limitation, M. L. R. P. 246.) The estate limited to the trustees was always ready to come into effect upon the determination of A.'s estate; and, if it ever took effect, would last till A.'s death, when his eldest son's estate would become vested, even if he were *en ventre sa mère*; for a posthumous child took as if he had been born in his father's lifetime. (10 & 11 Will. 3, c. 16; Co. Lit. 298 *a* (n. 3); M. L. R. P. 242.)

Trustees to preserve contingent remainders.

Real Property Act, 1845.

The Real Property Act, 1845 (8 & 9 Vict. c. 106, s. 8), enacts that contingent remainders existing at any time after 31st Dec., 1844, "shall be capable of taking effect notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold"; and has

(*q*) M. L. R. P. 241.

therefore rendered it unnecessary to insert this limitation to trustees in the case above stated.

40 & 41 Vict. c. 33.

The Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33) enacts that "Every contingent remainder created by any instrument executed after the passing of this Act (namely 2nd of August, 1877), or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use, or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation." See M. L. R. P. 282 et seq.

Trustees to preserve contingent remainders sometimes still required.

It must be especially noticed that these Acts do not give any effect to a contingent remainder which was originally limited without a preceding estate of freehold to support it. They merely prevent the destruction of a contingent remainder by the determination of the preceding estate in cases where such a remainder was originally well limited. Let us consider the three cases of (1) a limitation to the use of A. for life, remainder to the use of A.'s eldest son in tail; (2) a limitation to the use of A. for life, remainder to the use of the eldest son of B., a living person, in tail; and (3) a limitation to the use of A. for ninety-nine years, if he should so long live, remainder to the use of his eldest son in tail—where the son in each case is unborn at the time of the settlement. In the first and second cases, the contingent remainder is well created—it is supported by an estate of freehold, and nothing that A. can do will destroy it; but there is a great difference between the two cases—for in the first case, as any son of A. must be begotten in his lifetime, the son's estate must necessarily vest on A.'s death, and therefore, although prior to the Real Property Act, 1845 (8 & 9 Vict. c. 106), it might have failed owing to the for-

feiture, surrender, or merger of A.'s life estate before the son was born, that Act now prevents it from failing. In the second case, it is possible that B.'s eldest son may not be begotten till after A.'s death, in which case, as his contingent remainder would have been unsupported on A.'s death such son would not take anything, unless the limitation of his estate was contained in an instrument executed on or after the 2nd August, 1877, in which case his remainder would take effect under the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33). In the third case, the contingent remainder is not supported by a freehold estate, and can therefore never take effect. M. L. R. P. 243 (*r*).

Cross remainders in tail.

10. The effect of giving cross remainders in tail between the daughters is to make the land go as nearly as possible as if an estate tail had been limited to the father and he and all his sons had died without barring the entail.

The limitations run as follows :—"To the use of all the daughters of [*the husband and wife*] in equal shares as tenants in common in tail." So far, the intention is to divide the estate into as many equal parts as there are daughters, and to give one share to each daughter. The form continues—"And if and so often as there shall be a failure of issue of any such daughter, then, as well as to her original share as also to any share or shares which shall have accrued to her or her issue by virtue of this present limitation, to the use of the others of such daughters in tail in equal shares as tenants in common." This latter part of the clause gives the cross remainders. The reader will observe that its effect is, on the death of any daughter and the failure of her issue, to divide both her original share and any additional share which she or her issue may have taken (in other words, all which she or her issue is *then* entitled to) between the other daughters in equal shares in tail.

(*r*) The rule of law which requires a contingent remainder to be supported by a particular estate of freehold applies only to legal estates; (M. L. R. P. 247), and not to an equitable estate becoming subsequently clothed with the legal estate; *Re Freme* (1891), 3 Ch. 167.

The final part of the clause is, "And if there shall be a failure of issue of all such daughters but one, or if there shall be but one such daughter, then as to the entirety of the premises to the use of such one or only daughter in tail." So that, if all the daughters but one die without issue, that one takes everything. The student will have no difficulty in understanding the abbreviated form where the words "in tail" are used for creating the estates tail (2 K. & E. 587).

To take an example:—Let the daughters be A., B., C., and D.; then they each take an original one undivided fourth share in tail. Now suppose D. to die without issue, her original fourth is divided into three parts, one of which goes to each of her sisters, A., B., and C., each of whom now has her original $\frac{1}{4}$ and also $\frac{1}{3}$ of D.'s original $\frac{1}{4}$, so that $\frac{1}{4} + \frac{1}{3}$ of $\frac{1}{4} = \frac{1}{3}$ is the share to which each is now entitled.

Suppose now that C. dies without issue, her share (both her original $\frac{1}{4}$ and her accrued $\frac{1}{3}$ of $\frac{1}{4}$) is divided into two parts, each of which $= \frac{1}{2}$ of $\frac{1}{3}$. One of these added to the share to which B. or A. is now entitled, $\frac{1}{3}$, gives $\frac{1}{3} + \frac{1}{2}$ of $\frac{1}{3} = \frac{1}{2}$; and so, if B. dies without issue, A. takes $\frac{1}{2} + \frac{1}{2} = 1$, the whole.

In limiting cross remainders in tail, care must be taken that the accruing shares (that is, the additional share or shares which any daughter or her issue succeeds to on the death of any of her sisters without issue, are given over together with her original share; for, if this be not done, any share which accrues to a daughter on the death of one of her sisters without issue, will not, on her subsequent death without issue, accrue to her sisters or their issue, but will pass to the next remainderman.

Power to husband to jointure future wife.

15. The power to the husband to jointure an after-taken wife (see form in 2 K. & E. 602, Stud. Prec. 92) authorises him, either before or after his marriage with her, to limit to her a jointure rent-charge not exceeding a certain amount, with powers of distress and entry, and also either himself to limit a term or to authorise her to limit a term for further

securing it. The clause also declares that the husband may exercise the power as often as he may marry.

It will be observed that the statutory remedies given by the C. A. 1881, s. 44, for enforcing payment of a rent-charge, arise only "so far as those remedies might have been conferred by the instrument *under which* the annual sum arises, but not further." Where a rent-charge is limited under a power, there is a question of whether it "arises under" the settlement creating the power, or "under" the instrument by which the power is exercised. It is obvious that, if the rent-charge "arises under" the latter, the statutory remedies will arise only in case the settlement expressly authorises their insertion in the instrument by which the power is exercised. On the other hand, if that instrument is to be considered as a part of the settlement, so that the rent-charge "arises under" the settlement, it would be unnecessary in the settlement to authorise the husband to limit the powers of distress or entry. Until the question whether the rent-charge "arises under" the settlement has been determined, it will be proper in the settlement to authorise the husband to limit powers of distress and entry to the wife, and to give power to her to limit a term. If this be done, it will be unnecessary in the deed exercising the power expressly to give these powers, as they will arise by virtue of the Act. The question how far the instrument by which a power is exercised is to be considered as forming one instrument with the instrument creating the power, which is a question of great nicety, will be found discussed in Interp. 243 (*s*).

Power to charge portions for children of future marriage.

16. The power to the husband to charge portions for his children by a subsequent marriage contains several clauses (see form in 2 K. & E. 604):

The *first* is a power enabling him to charge the estates with a sum either fixed in amount or varying with the number of the children by an after-taken wife, to vest in

(*s*) See *A. G.* v. *Chapman* (1891), 2 Q. B. 526; and Butler's note to Co. Lit. 272 *a*, s. vii. 2.

them with such provisions as to maintenance and advancement as he or any one authorised by him shall appoint.

By the *second* and *third* clauses he is authorised to charge the estate with maintenance and advances for the expectant portionists.

By the *fourth*, it is declared in what events the advances are to be taken into account in determining the total amount raisable for portions.

By the *fifth*, power is given to the husband to limit a term for securing the portions and sums raisable for maintenance and advancement.

It will be observed that, as a man can leave but one widow, only one jointure can be charged on the estate however often he may marry; but, as he may leave children by every marriage and may exercise his power of charging portions as often as he marries, it is proper to add a provision limiting the total amount chargeable for portions by virtue of the power, and making any excess that may be charged sink into the property (see form in 2 K. & E. 607).

Where the limitations include the children of the husband by any marriage, the power to charge portions for his children by a subsequent marriage should be restricted to "younger" children (see 2 K. and E. 604).

The student should compare the clauses under consideration with the trusts of the portions term (*ante*, p. 380).

Management during minorities.

17. Difficulties occur in the management of the property, when an infant becomes entitled in possession. To obviate these, a clause was inserted in settlements before 1882, directing the trustees to enter during the minority of every infant tenant for life (if the frame of the settlement admitted of such) or tenant in tail by purchase, with very extensive powers of management; and with directions, after payment of all outgoings, and maintaining the infant, to accumulate the surplus income for his benefit should he attain twenty-one; but, if he should die under age, to apply the accumulations as if they had arisen under an exercise of the power of sale. If the limitations extended to

females, the power was made exercisable during the minority of any male, and minority and discoverture of any female.

The powers of management included the felling of timber or underwood; opening and working mines, erecting, pulling down, and repairing buildings; draining and insuring.

Occasionally, by an oversight, the trust for accumulation was not restricted to the minorities of tenants for life or in tail *by purchase*; but was extended to the minority of all tenants in tail—*i.e.*, including those taking *by descent*. In this case the trust altogether failed, as it was void for remoteness—*i.e.*, it offended against the rule of law against perpetuities.

Rule against perpetuities (*t*).

The rule against perpetuities may be stated as follows:—"Every disposition of property, not being a remainder expectant on, or an executory limitation in defeasance of, an estate tail, purporting to regulate the devolution of the property at time more remote than twenty-one years from the death of a person, or the survivor of several persons, *in esse* is absolutely void." For the purposes of the rule, a child *en ventre sa mère* is considered as being *in esse*.

In applying the rule it must be remembered that possible, not actual, events are contemplated (*Dungannon* v. *Smith*, 12 Cl. and Fin. 546; *Re Dawson*, 39 Ch. D. 159).

Suppose, for instance, that a testator leaves property in trust for his unmarried daughter for life, remainder in trust for any husband whom she may marry for life, remainder to such of her children as shall be living at the death of the survivor of husband and wife. The gift to the children offends against the rule; for the class who are to take may not be ascertained till the death of the husband, who may be unborn at the death of the testator. (*Re Harvey*, 39 Ch. D. 289; *Re Frost*, 43 Ch. D. 246.)

A trust for the application of the accumulations during the minorities of *all* tenants in tail offends against the rule. It is an attempt to regulate the devolution of personal property on the death of *any* tenant in tail during his minority, an event which may possibly happen after the lapse of any time.

(*t*) M. L. R. P. 286.

The Thellusson Act.

Before the passing of the Accumulations Act, 1800, popularly known as the Thellusson Act (39 & 40 Geo. 3, c. 98), the accumulation of the income of property, and the suspension of the enjoyment of it, might have been directed for the same period as the suspension of its alienation—viz., for a life or lives in being, and twenty-one years afterwards. (See per Lord Eldon, C., in *Griffiths* v. *Vere*, 9 Ves. 127.) In the year 1796, Mr. Thellusson gave real estates of the value of £5,000 a year, and other estates which he directed to be purchased with the residue of his personalty, amounting to £600,000, to trustees upon trusts for accumulation during the lives of all his issue male living at his decease, and the survivor of them. To put it shortly, he directed his property to be accumulated during the lives of every one of his male descendants whom he could possibly have known. This trust was held to be valid; but the Thellusson Act was passed for the purpose of preventing any such disposition being made in future—"posthumous avarice," as it has been called by a learned Judge. By this Act (see M. L. R. P. 106) the period of accumulation "whereby the beneficial enjoyment is postponed" (*u*) is restrained to *one* only (*x*) of the following periods:—

Period of accumulation restrained to one of four periods.

1st. The life of the settlor; *or*,

2nd. The term of twenty-one years from his death (*y*); *or*,

3rd. During the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the death of the settlor (*z*); *or*,

(*u*) *Vine* v. *Raleigh* (1891), 2 Ch. at p. 23. A trust to pay the premiums on a policy on the life of a stranger is not obnoxious to the Act; *Bassil* v. *Lister*, 9 Ha. 177.

(*x*) *Jagger* v. *Jagger*, 25 Ch. D. 729.

(*y*) If the accumulation is to commence at a time subsequent to the death, it must end when twenty-one years from the death have elapsed; *Shaw* v. *Rhodes*, 1 My. & C. 135; 5 Cl. & Fin. 114; *A.-G.* v. *Poulden*, 3 Ha. 555.

(*z*) This only refers to a direction to accumulate when the accumulation is to begin from the grantor's death; *Jagger* v. *Jagger*, 25 Ch. D. at p. 733.

4th. During the minority or respective minorities of any person or persons who, if of full age, would be entitled to the income directed to be accumulated.

Exceptions from Act.

The second section limits the operation of the Act, by providing that it shall not extend to any provision for the payment of the debts of the settlor, or any one else, nor for raising portions for the children of the settlor or any person taking any interest under the settlement, nor touching the produce of timber or underwood.

Trusts for maintaining houses in good habitable repair, for rebuilding houses, and for insuring houses, are not within the Act (*z*).

It is to be observed that no trust for accumulation will be valid which would have been void before the Act; so that, if the trust offend against the rules as to perpetuities, it is altogether void. But a trust for accumulation which does not offend against the rules as to perpetuities, but exceeds the limits allowed by the Act, will be void only so far as it exceeds those limits. The accumulation will go on so long as the Act allows, and then will cease (*a*).

An immediate trust for accumulation for a term of twenty-one years is probably invalid as it is not allowed by the Act; but a trust for accumulation during twenty-one years if the settlor shall so long live is valid.

A trust for accumulation for any purpose (not falling within the exceptions from the Act) and also during minorities, is contrary to the Act, as involving accumu-

(*z*) *Vine* v. *Raleigh* (1891), 2 Ch. 13; *Re Mason* (1891), 3 Ch. 467. As to the distinction between a trust to improve land and a trust to purchase land, see *Drake* v. *Trefusis*, L. R. 10 Ch. 364.

(*a*) See *Griffiths* v. *Vere*, 9 Ves. 127; S. C., Tud. L. C. R. P. 618 and notes thereto, at p. 630; *Longdon* v. *Simson*, 12 Ves. 295. As to the right to the income directed to be accumulated for a term longer than that allowed by the statute after the accumulations cease, see 1 Jarman on Wills, 281; *Eyre* v. *Marsden*, 2 Keen 574, and other cases cited in Tud. L. C. R. P. 632.

lations during two periods (*Wilson* v. *Wilson*, 1 Sim. N. S. 288). To avoid this, it appears proper, when there is some other trust for accumulation, to substitute for the usual trusts of the fund accumulated during minority trusts to apply it in discharge of incumbrances; and, subject thereto, trusts for the person during whose minority it was accumulated. The former of such trusts falls within the exceptions from the Act, and the latter gives the accumulated fund to the person who is entitled to it by law on the assumption that the trust for accumulation is invalid.

The Accumulations Act, 1892 (55 & 56 Vict. c. 58), prohibits the settlement (after the 27th of June, 1892) of any property, whether real or personal, so as to accumulate the income "for the purchase of land only" for any longer period than during the minority of a person who, if of full age, would be entitled to receive the income. It will be observed that the ordinary trusts for accumulation during minorities are not affected by the Act, nor, according to *Re Danson* (13 Rep. 633), is a trust for accumulation for the general purposes of the settlement (see the form in 2 K. & E. 601).

Provisions of C. A. 1881, as to minority.

In ordinary cases the power of management during minority, and the auxiliary clauses may be omitted in reliance on the C. A. 1881, s. 42. This authorises "the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court on the application of a guardian or next friend of the infant," to enter into and continue in possession of the land, "if and so long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried." The

trustees have the ordinary powers of management (with certain restrictions where the infant is impeachable for waste), and of employing the income for the infant's maintenance, &c., or of paying it to his parent or guardian to be applied for that purpose.

The surplus income is to be accumulated at compound interest, and (subject to a power of applying the accumulations for maintenance, &c.) the accumulated fund is to be held in trust (1) for the infant if he attains twenty-one; (2) for the separate use of the infant being a woman and marrying under twenty-one, so that her receipt after marriage though still an infant is a good discharge; (3) if the infant dies under twenty-one and being a woman without having been married, then if the infant was tenant for life, or tenant in tail, &c., by purchase, on the trusts declared of the accumulated fund by the settlement; but where no such trusts are declared, or the infant has taken the land by descent, or is tenant in fee simple (absolute or determinable), then in trust for the infant's personal representatives as part of his personal estate. The provisions of the section may be excluded or varied by the settlement (sub-s. 7). The most important points in which the statutory provisions differ from the usual express power (see form in 2 K. & E. 609) are (1) that the statutory provisions are permissive instead of being obligatory; (2) that they extend to infants taking by descent, instead of being restricted to infants taking by purchase. Where the statutory provisions are relied upon, it is proper to expressly appoint the trustees of the settlement trustees for the purposes of the section (see form in 2 K. & E. 614), to make it obligatory on them to enter and take possession during minorities, and, if the circumstances so require, to give them additional powers of management. The statutory provisions as to the destination of the accumulations in case of the death of the infant under twenty-one, and in the case of a female without having been married, are not, in the case of an infant taking by purchase, as convenient

as those contained in the ordinary clause; and therefore it is better to insert an express declaration as to the destination of the accumulations in this case, similar to that contained in the ordinary clause. This declaration should never be omitted where the legal estate is vested in the trustees: for such a case falls within the 43rd section, which directs that, when any property is held by trustees in trust for an infant for life, &c., the trustees may apply the income of the property for his maintenance, &c.; and that they shall accumulate the surplus income and hold the accumulations "for the benefit of the person who ultimately becomes entitled to the property from which the same arise," a provision which is incompatible with that of the 42nd section.

Power to lease under the Settled Estates Act.

18. At Common Law a tenant for life can make no leases for a term longer than his own life. (M. L. R. P. 49.) The Settled Estates Act, 1877 (40 & 41 Vict. c. 18, replacing the similar Act of 1856, 19 & 20 Vict. c. 120), authorises a tenant for life, or in tail, in possession under a settlement made since the 1st November, 1856, to grant leases (conformable to the provisions of the Act) of any of the settled land, except the principal mansion-house and demesnes, for twenty-one years, to take effect in possession or within one year after the making of the lease; and under the same Act building, repairing, or mining leases of land, or leases of easements over land comprised in any settlement, may be granted with the sanction of the Court. But, notwithstanding the existence of these statutory powers, it was the practice, in settlements before 1883, to insert express powers of leasing, so as to enable leases for twenty-one years to be made, not only by tenants for life, but also during the minority of any infant tenant for life or in tail; and to enable building and mining leases and leases of easements to be made without applying to the Court. This express power operated under the Statute of Uses; so that any term created by an exercise of the power took effect exactly as if it had been limited by way of use in the

Power to lease inserted in settlements.

Nature of the power.

original settlement (*b*). The distinction should be noticed between such a power and a power of leasing vested in trustees to whom land is conveyed in trust for sale. In the latter case they have the estate in the land, and they are at law absolute owners, and as such can lease. But, as granting leases would be inconsistent with their duties as trustees for sale, Equity would not allow them to lease. The insertion of the power to lease in this latter case operates merely as a declaration that Equity shall not interfere with the legal right of the trustees to grant a lease; they grant the lease out of their estate, and the power operates in Equity only.

Donees of power.

The powers of leasing were generally made exercisable by the tenant for life while in possession, and by the trustees of the settlement during the minority of any person who, if of full age, would be entitled to the possession. The

Usual powers of leasing.

powers of leasing usually inserted were:—1st, a power to lease for twenty-one years at rack-rent; 2nd, a power to grant building leases for ninety-nine years; 3rd, a power to grant mining leases for sixty years. (If this power was inserted, it was proper to insert powers of granting leases of easements, such as water-leaves and way-leaves.) 4th, a power to accept surrenders of leases; and, on granting a new lease on the surrender of an existing lease, to take the value of the surrendered lease into account in granting the new lease, which could not be done under the common power to lease at rack-rent, as the rent reserved would in such a case be less than rack-rent; 5th, a power to make agreements for leases. The powers were made exercisable by deed; and it was convenient to direct that the leases should take effect in possession, or within six months from the date of the lease (*c*).

When a lease, granted under an express power, is invalid owing to some deviation from the terms of the power, it will, under the Leases Act, 1849 (12 & 13 Vict. c. 26), and the

(*b*) See this explained in Smith, L. & T., Lect. II., pp. 58 *et seq.*

(*c*) As to powers of leasing see Farw. Pow., ch. xvii. pp. 588, *et seq.*

Leases Act, 1850 (13 & 14 Vict. c. 17) (*d*), be considered in Equity as a contract for the grant, at the request of the lessee, of a valid lease, with such variations as may be necessary for the purpose of bringing it within the terms of the power (*e*).

Statutory powers.

In ordinary cases express powers of leasing are not inserted in settlements since 1882, because the powers conferred by the S. L. A. (*post*, p. 423) are sufficient; but, if it is probable that the estate may become extensively available for building, or if it be a mineral property, it may be proper to extend the statutory powers.

Best yearly rent.

The direction in the express or statutory power that the best yearly rent or rack-rent must be reserved does not mean that the largest offer is to be accepted without reference to the eligibility of the tenant. (*Doe* d. *Lawton* v. *Radcliffe*, 10 East, 278; see Farw. Pow., 614.)

"Rent," meaning of.

The word "rent" in an express power may be construed to mean not merely money, but any return or equivalent adapted to the nature of the subject demised. Thus a render of ore may be reserved under a mining lease instead of a money rent, unless from the general frame of the power it appears that a money rent alone was contemplated (*Campbell* v. *Leach*, Amb. 740; *Basset* v. *Basset*, Amb. 843). The wisest method is, in all such cases, to state distinctly what may be reserved; thus, "the best rents, renders, royalties, or reservations by the acre, ton, or otherwise," appears to cover every possible case.

Fines.

Fines taken on leases granted under the powers of the S. L. Acts, 1882 to 1890, must be paid to the trustees of the settlement as capital money (*f*) in the absence of directions to the contrary; but, where the leases are granted under an express power, it depends upon the language of the settlement whether they are to be paid to the trustees or to the donee of the power. (*Simpson* v. *Bathurst*, L. R. 5 Ch. 193; *Mostyn* v. *Lancaster*, 23 Ch. D. 583.)

(*d*) See these Acts in Farw. Pow., 351.

(*e*) See *Gas Light & Coke Co.* v. *Towse*, 35 Ch. D. 519, at 539. *Hallett to Martin*, 24 Ch. D. 624; *Sutherland* v. *Sutherland* (1893), 3 Ch. at p. 194.

(*f*) S. L. A. 1884, s. 4.

Power to grant licences to copyholders (*f*).

19. The express power to grant licences to copyholders, the donees of which were generally the same as the donees of the powers of leasing, inserted in settlements before 1883, consisted of—

*First.* A power to authorise copyholders to commit specified forms of waste;

*Secondly.* A power to license copyholders to grant leases;

*Thirdly.* A power to fix, during the term comprised in the licence, the sum which should be considered as the annual value for assessing fines on admittances of new copyhold tenants;

*Fourthly.* A proviso that no fine should be taken for granting a licence except the customary fine, that the old rents, &c., should be reserved, and that the licence should be entered on the Court Rolls of the manor.

It is, to say the least, doubtful whether, in the absence of any special power, a tenant for life of a manor could not grant licences for the purposes provided for in the first two clauses. (See also the Settled Estates Act, 1877, s. 9.) But in practice they were generally inserted.

Copyhold fines.

The fine payable to the lord of the manor on the admittance of a new tenant, whether on the death of, or alienation by, the former tenant, may, according to the custom of the particular manor, be either a "fine certain," *i.e.*, a fixed sum of money (generally of small amount), or a "fine arbitrary," *i.e.*, a sum of money estimated by reference to the rack-rent or full improved value of the property at the time of admittance. In the case of a fine arbitrary, therefore, persons claiming under a copyholder who had granted a building lease would, in the absence of the third clause, have had to pay a fine, not on the rental to which

(*f*) According to some authorities collected in Scriven on Copyholds, 7th ed., p. 225, a lord cannot grant a longer term in the tenancy than he has in the manor, except under a power springing from or added to the fee. Mr. Davidson, however (3 Dav. Prec., p. 541, note), after discussing these authorities and others, arrives at the conclusion that a licence to demise granted by a lord having a particular estate is practically sufficient.

they were entitled, but on the rack-rental of the property. The express power to grant licences (except as to committing waste) is now generally omitted in reliance on the powers conferred by the S. L. A. 1882, s. 14.

Donees of powers of sale, &c.

The powers to enfranchise copyholds, and to sell and exchange, inserted in settlements before 1883, were generally made exercisable by the trustees, but during the lifetime of the tenant for life, with his consent.

Power of enfranchisement.

20. The power to enfranchise copyholds was often omitted, as the enfranchisement might have been made very cheaply under the Copyhold Acts, 1841 to 1887 (now consolidated and replaced by the Copyhold Act, 1894) (*g*): and a prudent copyholder generally preferred to take an enfranchisement under the Acts rather than one under the express power; for, when an enfranchisement was made under the power, any charges affecting the manor were let in upon the enfranchised lands; whereas, if it were made under the Copyhold Acts (now under the Copyhold Act, 1894), such charges would not affect them. The power should now always be omitted in reliance on the provisions of the S. L. A. 1882, s. 3 (ii.).

Power of sale.

21. The express power of sale inserted in settlements before 1883, with its ancillary trusts and powers, in its simplest form consisted of the following clauses, but it was in some cases convenient to insert others.

Liberty to sell.

By the *first*, power was given to the trustees (during the life of the tenant for life, with his consent in writing, and during the minority of any tenant in tail by purchase who would, if of full age, be entitled to the possession or receipt of the rents and profits, at their discretion) to sell or exchange the premises. This is a mere equitable power, given to persons who have no interest in the land. Express permission was given to sell by public auction or private contract, the clause following closely the corresponding clause in the express power of sale in a mortgage (*ante*, p. 163). It should be observed that, although the practice

(*g*) See M. L. R. P. 334 *et seq.*

General power does not infringe the rule against perpetuity.

was to authorise the power to be exercised only during the lifetime of the tenant for life and minority of the tenants in tail by purchase, the power would have been good if authorised to be exercised at any time; for, as any tenant in tail could, by barring his estate tail, prevent the power from being exercised, the power limited in the most general form did not infringe the rule against perpetuities (*h*). The question whether the power is exercisable after the tenant for life is dead and the first estate tail barred, so as to override portions, depends upon the intention as shown by the language of the power (*i*).

Power of revocation and new appointment.

By the *second* clause, power was given to the trustees, for the purpose of carrying out the sales, to revoke the old uses and appoint the property to a purchaser, subject to any then existing mortgages and leases. An appointment under the power takes effect as a declaration of a use, and the uses declared in the appointment are fed out of the seisin of the grantee to uses in the settlement. See form in Stud. Prec. No. V., p. 11.

Reinvestment in land.

The *third* clause contained a direction to the trustees to receive all moneys arising on a sale or enfranchisement, and to apply them in the discharge of incumbrances or to invest them in the purchase of land.

To be conveyed to the uses of the settlement.

The *fourth* clause directed that the land purchased or taken in exchange should be settled to the uses and trusts declared by the settlement or under any exercise of the powers of jointuring or charging portions, or as near thereto as circumstances would admit, but not so as to increase charges or powers of charging; with a provision that leaseholds should not vest absolutely in any tenant in tail by purchase dying under twenty-one (see *post*, p. 400), but that on his death they should devolve as if they were freeholds of inheritance.

(*h*) See this discussed, Dart, V. & P. 69; 32 Sol. J. 689, 705, 718, 729; *Goodier* v. *Edmunds* (1893), 3 Ch. 455; *Re Lord Sudeley & Baines & Co.* (1894), 1 Ch. 334.

(*i*) Sugd. Pow. 859; 3 Dav. Prec. 573, note; *Re Cotton*, 19 Ch. D. 624.

By the *fifth* clause the trustees were directed to invest any moneys arising from any enfranchisement, sale, or exchange, until it was applied as aforesaid, and to apply the income as if it were the rents arising from hereditaments actually purchased with the moneys. As the real intention was that the moneys should be reinvested in land, interim investments giving a high rate of interest were usually not authorised. Interim investment.

All these long clauses, except the earlier part of the first, giving liberty to sell and exchange, might have been safely omitted in simple cases, in reliance on the provisions of Lord Cranworth's Act (23 & 24 Vict. c. 145), which was repealed by the S. L. A. 1882. In the absence of a power of sale, the settled property could have been, and still can be, sold under the provisions of the Settled Estates Act, 1877, on application to the Chancery Division. The power of sale is now generally omitted in reliance on the S. L. A. 1882. (See *post*, p. 425.)

Sometimes, owing to the settlement containing limitations to the daughters in tail with cross remainders, or for other reasons, an infant may become entitled to an undivided share while the persons entitled to the other shares are *sui juris*. The question who are to be the donees of the express powers (if any) during a minority also requires some consideration. As to the exercise of the statutory powers in these cases, see the S. L. A. 1882, ss. 19, 60, *post*, p. 411. Powers as to undivided shares;

The express power of management during a minority (*ante*, p. 391) was usually made exercisable by the trustees in respect of the minor's share, and they were empowered to concur in exercising the power with the owners of the other shares. or during of minority

There were two schemes with respect to the express powers of leasing. By one scheme the power, after the death of the tenant for life, was restricted to the shares of the minors, so that the concurrence of the adult co-owners was necessary; by the other the power was vested in the trustees as to the entirety so long as any share belonged to a minor.

It was most convenient to vest the express powers of enfranchisement, sale, and exchange in the trustees, so long

as any undivided share belonged to a minor, but to make them exercisable only with the consent of the adult co-owners (see 2 K. & E. 636).

Copyholds.

22. Where the settlement includes copyholds, the settlor sometimes covenants to surrender them to uses corresponding to the uses of the freeholds. This however is incorrect; for it is, to say the least, doubtful whether all the powers that affect the freeholds can at law be made to affect the copyholds. The proper plan is to covenant to surrender the copyholds to the use of the trustees "Upon such trusts, and with and subject to such powers, &c.," as shall correspond with the uses, &c., declared concerning the freeholds, "as nearly as the different quality of the premises will admit, but not so as to increase charges and powers of charging." And, as the parties may omit to have the surrender made, the settlor should covenant to stand possessed of the copyholds until the surrender upon the same trusts, &c., as if the same had been actually surrendered (see form in 2 K. & E. 650).

Leaseholds.

23. Leaseholds are assigned (see form in 2 K. & E. 651) to the trustees upon trust to pay the rent and perform the lessee's covenants: and subject thereto, upon such trusts, &c., as shall most nearly correspond to the uses of the freeholds. If the form stopped here, the first tenant in tail coming into *esse* would at once become absolutely entitled to the leasehold; for words which confer an estate tail in real, give an absolute interest in personal property. (See Interp. 260.) A declaration is therefore inserted, that they shall not vest absolutely in any person made tenant in tail *by purchase* unless he attains the age of twenty-one years; but, on his death under age, shall devolve as if they had been freeholds of inheritance included in the settlement (*k*).

(*k*) The words "by purchase" are inserted because if the direction applied to all tenants in tail it would be void for remoteness (*ante*, p. 388); but if these words, and also the words as to devolution on the death of the "tenant in tail" are omitted, it may be possible to construe the words "tenant in tail" as referring only to a tenant in tail by purchase. *Christie* v. *Gosling*, L. R. 1 H. L. 279; 2 Vaizey on Settlements, 1345: Theob. Wills, 485.

Heirlooms.

24. Personal chattels settled so as to accompany freeholds in strict settlement, or to be enjoyed by the person for the time being entitled to an hereditary title, are sometimes, though incorrectly, called heirlooms (*l*). The reader who has mastered the preceding paragraph will have no difficulty in understanding the modern trust for heirlooms. (2 K. & E. 653.) See as to some other forms, 3 Dav. Prec. 624, *et seq.*

As the object of declaring trusts of chattels as heirlooms is to secure the enjoyment of them by the successive owners of the estate, it is not the practice to give an express power of sale over them; and, as the Court had no jurisdiction to order a sale of the heirlooms simply on the ground that a sale would be for the benefit of the parties interested (*m*), great inconvenience was sometimes experienced prior to 1883, owing to the impossibility of selling them; but now heirlooms can be sold by order of Court under the S. L. A. 1882, s. 37, whatever be the date of the settlement.

Receipt and trustee clauses.

25, 26, 27. See as to the receipt clause, *ante*, p. 332, and as to the trustee clauses, *ante*, p. 357. It will be observed that, where there is more than one set of trustees, the express power of appointing new trustees requires a verbal alteration.

Covenants for title.

28. The express covenants for title in settlements before 1882 were entered into with the grantee to uses, so as to run with the land for the benefit of all persons claiming under the settlement, or under any exercise of the powers contained in it. They were similar in form to those inserted in a purchase deed. They are now omitted, and a covenant for further assurance is usually implied by conveying "as settlor" (C. A. 1881, s. 7 (1) E.; *ante*, p. 311.

(*l*) As to the correct meaning of "heirlooms" see M. L. R. P. 11; Leake, Us. & Prof. 136.

(*m*) *D'Eyncourt* v. *Gregory*, 3 Ch. D. 635; but it had jurisdiction to direct a sale for the purpose of paying off mortgages on the land with which they are settled, if it was for the benefit of all parties; *Fane* v. *Fane*, 2 Ch. D. 711.

## PART III.—THE SETTLED LAND ACTS, 1882 TO 1890.

The S. L. Acts, 1882 to 1890.

By virtue of the S. L. Acts, 1882 to 1890, a tenant for life and certain other limited owners can exercise over settled land the powers conferred by the Acts, which include all the powers of disposing of, and most of the powers of managing, the property which, prior to 1883, were usually inserted in settlements of real estate, and some additional powers. Most of the statutory powers can be exercised only after notice is given to the trustees of the settlement, and some only with their consent, or under an order of Court. While it is of the utmost importance for the student to learn over what property, by whom, and under what circumstances the statutory powers can be exercised, it is perhaps only necessary for him to have a general knowledge of what the powers are; for no prudent conveyancer would attempt to frame an instrument exercising the powers without referring to the Acts. It is also necessary for him to understand the meanings of "settlement" and "settled land" as used in the Acts.

Settlement" defined.

"Settlement" is defined in the S. L. 1882, Act, s. 2 (1), so as to include every "instrument or any number of instruments, whether made before or after, or partly before and partly after the commencement of the Act," under or by virtue of which "any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession" (*n*).

The expression "limited to any persons by way of succession" does not mean that those persons necessarily take freehold interests. An instrument charging land with the payment on the death of any person of a jointure or portions is a settlement; *Re Mundy and Roper* (1899), 1 Ch. 275 (*nn*); and, according to the reasoning in that case, an instrument charging land with the immediate payment of an annuity for life, or charging it with the payment of portions to infants on their attaining twenty-one is a

(*n*) See note 1 K. & E. 467. (*nn*) Discussed 43 Sol. J. 653, 669.

settlement, for on the death of the annuitant, or on the death of a portionist under the age of twenty-one, an interest in the land will devolve by way of succession.

"The instruments" appear to be those which, taken together, effect the settlement of a given interest (*o*). For example, a strict settlement and a conveyance of land to the uses of the settlement taken together constitute "the settlement" of the land within the meaning of the Act. Where the fee simple is settled by an instrument under which the father takes an estate for his life, and the eldest son takes an estate tail in remainder, and on the latter attaining twenty-one a disentailing assurance is executed and the land resettled, the land may be considered as settled by all the three instruments; or, during the father's life, it may be considered as being settled by the original settlement only, and after his death it may be considered as being settled under the latter settlement only. But the effect is different according as we take only one or take the three instruments together as being "the settlement." During the father's life, as the statutory powers conferred on him by the original settlement are incapable of being assigned or released (*Re Mundy and Roper, ubi sup.*), the exercise by him of those powers overrides the limitations in the subsequent deeds, and therefore it is sufficient to treat the original settlement as "the settlement"; but, if for any reason—as, for instance, for the purpose of enabling the tenant for life under a subsequent instrument to override a jointure or portion charged (but not actually raised) by the original settlement—it is convenient to treat all three instruments as the settlement (see *Re Marquis of Ailesbury* (1893), 2 Ch. 345; *Re Mundy and Roper, ubi sup.*), such instruments may be so treated. The settlement effected by the several instruments may be called a "compound

(*o*) One instrument may create a settlement of a given interest, though at the same time several instruments may also constitute a settlement of the same interest. *Re Du Cane* (1898), 2 Ch. 96; approved *Re Mundy and Roper* (1899), 1 Ch. at p. 296.

settlement," and trustees of this compound settlement must be appointed for the purposes of the S. L. Acts.

Where the tenant for life, in consideration of marriage, or as part or by way of any family arrangement (not being a security for money advanced), assigns or charges his life interest, the instrument by which he does so is to be deemed one of the instruments creating the settlement, and not as an instrument vesting in any person any right as assignee for value; see S. L. A. 1890, s. 4. But though such an instrument forms one of the instruments creating the settlement, it is not such for all purposes, but merely for the purpose of excluding the application of S. L. A. 1882, s. 50; see *Re Du Cane* (1898), 2 Ch. 96.

Remainder or reversion not disposed of by settlement.

An estate in remainder or reversion not disposed of by the settlement, and reverting to the settlor or descending to the testator's heir, is for the purposes of the Act an estate coming to the settlor or heir under the settlement, and comprised in the subject of the settlement, S. L. A. 1882, s. 2 (2); so that, if A. devises land to or in trust for B., who is not his heir-at-law, for life, without any further devise, in which case there is a resulting use to A.'s heir-at-law (1 Jarman on Wills, chap. xviii.), the will creates a succession, and is a settlement within the meaning of the Act. If A. settles land on himself for life, with remainder for a term of years to secure a jointure and portions, there is a resulting use to him in fee, which coalesces with his life interest *sub modo*, and the settlement creates a succession within the meaning of the Act, during A.'s lifetime. It will be observed that, as the powers of the Act apply only to the interests that are the subject of the settlement (see the next paragraph), they would not, in the absence of this sub-section, apply to the fee in either of the above examples.

"Settled land" defined.

"Settled land" is defined by S. L. A. 1882, to be "land and any estate or interest therein which is the subject of a settlement," s. 2 (3).

There are three remarks to be made on this definition:—

*First.* Regard being had to the definition of "land" in an

Act of Parliament (*q*), and since in the S. L. Acts "land" includes incorporeal hereditaments, also an undivided share in land (*r*), it appears that "settled land" includes leaseholds and copyholds, and incorporeal hereditaments, such as advowsons. *Second.* As "settled land" means the estate or interest which is settled, it includes the legal estate, if that is settled; and, in that case, the powers of the S. L. Acts which are exercisable over "the settled land" bind the legal estate, even if it be vested in a trustee; so, for example, as to enable a tenant for life to convey a legal interest by granting a lease of lands vested in the trustees of the settlement. *Third.* The powers of the S. L. Acts, which are exercisable over the "settled land" only, do not enable the person exercising them to affect any interest in the land greater than that settled. For example, if the legal estate is outstanding in a mortgagee, the equity of redemption is what is settled; and, though the tenant for life can grant a lease of it under the S. L. Acts, yet, if he wishes to bind the legal estate vested in the mortgagee, he must conform to the provisions of the C. A. 1881 (*ante*, p. 159). Again, the tenant for life cannot grant a lease of settled leaseholds for a term longer than that for which they are held, or a lease of copyholds contrary to the custom of the manor.

"Tenant for life" defined.

The tenant for life is defined by S. L. A. 1882, to be "the person who is for the time being under a settlement beneficially entitled to the possession of settled land for his life" (*s*) (s. 2 (5)).

"Possession" includes receipt of income, *i.e.*, of rents and profits (s. 2 (10)), and therefore this definition of "tenant for life" includes all tenants for life, whether legal or equitable.

(*q*) See the Interpretation Act, 1889 (52 & 53 Vict. c. 63).

(*r*) S. L. A. 1882, s. 2 (10) (i).

(*s*) A trust to allow a person "to occupy" land so long as he wishes renders him a tenant for life within the meaning of the Act. *Re Carne's Settled Estates* (1899), 1 Ch. 324.

The word "possession" means possession properly so called, as distinguished from reversion or expectancy (*t*), and the Act does not draw a distinction as regards an infant being in possession personally or by his guardian (*u*).

Powers of tenant for life are exercisable notwithstanding charges on the fee or his estate;

The tenant for life can exercise his powers "notwithstanding that under the settlement or otherwise the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent" (s. 2 (7)).

Four cases are provided for by this sub-section together with sections 20 and 50 *infra*:—*First*, where the land is settled subject to incumbrances or charges; *second*, where it is incumbered or charged by the settlement, or becomes so by virtue of the powers of the settlement; *third*, where the interest of the tenant for life is incumbered or charged by the provisions of the settlement, as where it is given him charged with an annuity; *fourth*, where the interest of the tenant for life is incumbered or charged by his own act, as by his mortgaging it. The object of section 2 (7) is merely to provide that notwithstanding incumbrances the powers conferred on the tenant for life shall be exercisable, but it does not deal with the effect on the incumbrances of an exercise of the powers. This is provided for in the first, second, and third cases by S. L. A. 1882, s. 20 (see *post*, p. 422), and in the fourth case by s. 50.

and are incapable of being assigned.

The powers of the tenant for life cannot be assigned or released: and they do not pass to a person as being by operation of law or otherwise an assignee of the tenant for life, but remain exercisable by him after assignment, even if the assignment occurs by operation of law, as by his becoming bankrupt (s. 50 (1) (*a*)). A contract by a tenant for life not

(*t*) *Re Aitkinson*, 31 Ch. D. 577; *Re Jones*, 26 Ch. D. 741; *Re Clitheroe*, 28 Ch. D. 378, 31 Ch. D. 135; *Re Strangways*, 34 Ch. D. 423; *Re Edwards* (1897), 2 Ch. 412.

(*u*) *Re Morgan*, 24 Ch. D. 114, where it was held that under a trust for payment of the income to the testator's wife for the maintenance of the testator's son till he should attain twenty-one years, without being liable to account, the son was "in possession."

(*x*) *Re Mansel*, W. N. 1884, p. 209.

to exercise any of his powers under the S. L. A. is void (s. 50 (2) ). But this section operates without prejudice to the rights of any assignee for value of the interest of the tenant for life (*y*), and the assignee's rights are not affected without his consent (*z*), except that, unless he is actually in possession of the settled land or part thereof, his consent is not necessary for the making by the tenant for life of leases thereof at rack-rent, and in other respects in conformity with the S. L. A. (s. 50 (3) ). This section extends to assignments made or coming into operation before or after the passing of the S. L. A. 1882, and to assignments by way of mortgage or charge (s. 50 (4) ).

The effect of these provisions appears to be that the powers of the tenant for life are absolutely indestructible so long as the land remains settled, though the consent of his assignee may be necessary to their being exercised; *Re Mundy and Roper* (1899), 1 Ch. 275; that a contract by the tenant for life not to exercise his statutory powers, or a release by him of the powers, is absolutely void; that the tenant for life can grant, in conformity with the Acts, rack-rent leases which will bind his assignee for value, unless the assignee is actually in possession; that the exercise of the other statutory powers by the tenant for life is subject to the rights of his assignee for value, but that with his concurrence they can be exercised. It should be remarked that, as the exercise of the statutory powers is valid as against all persons but the assignee, cases may occur where a transaction may safely be completed without his concurrence; as, for instance, where he is mortgagee of the life interest of the tenant for life, and there is an ample margin of value, and a sale is made of only a small part of the property, or where it is wished to make an exchange of a small piece of land. In such cases it would be prudent to give the mortgagee notice of the sale; for it is possible that any

(*y*) See *Hardaker* v. *Moorhouse*, 26 Ch. D. 417; *Re Cooper*, 27 Ch. D. 565, and S. L. A. 1890 (53 & 54 Vict. c. 69), s. 4.

(*z*) See *Re Bedingfeld* (1893), 2 Ch. 333.

future advances made by him to the tenant for life in ignorance of the sale might have priority over the rights of the purchaser.

The question whether the tenant for life can exercise his statutory powers after he has released his life interest was left undecided by *Re Mundy and Roper* (1899), 1 Ch. 275. Probably, if after the release the land remains settled by virtue of the settlement under which he was tenant for life, he can exercise the powers with the consent of the releasee. The land remains settled if jointures or portions not already payable are charged by, or if the releasee is tenant for life or in tail under, that settlement; but if the original settlement is spent and the releasee is tenant in fee simple, the tenant for life cannot exercise his powers after the release, as the land is no longer settled.

See as to the destruction and release of powers before the S. L. Acts, Sugd. Pow., 49 *et seq.*, 82 *et seq.*; Farw. Pow., chap. ii.; see also the C. A. 1881, s. 52.

Notwithstanding the provisions of the C. A. 1882, s. 6, enabling a power, whether coupled with an interest or not, to be disclaimed, the tenant for life cannot retain his interest and disclaim the powers; for, by the S. L. A. 1882, s. 53, he is placed in the position of a trustee as to the exercise of the powers.

The exercise of powers by tenant for life cannot be restrained.

Every provision attempting by a gift over of settled land, or any other real or personal property, or by means of a condition, or by forfeiture or otherwise, to prevent the tenant for life from exercising his powers under the S. L. Acts, is void (S. L. A. 1882, s. 51 (1)) (*a*); and for this purpose an estate limited to him until he exercises such powers continues, notwithstanding an exercise of the power, as long as it would have continued if he had not exercised the power (s. 51 (2)), and no exercise of such power causes a forfeiture (s. 52).

(*a*) See *Re Hazle's S. E.*, 29 Ch. D. 78; *Re Paget's S. E.*, 30 Ch. D. 161; *Re Haynes*, 37 Ch. D. 306; *Re Ames* (1893), 2 Ch. 479; *Re Smith* (1899), 1 Ch. 331.

The intention of section 51 is to prevent the powers given by the S. L. Acts being cut down by the settlement itself, or any other instrument; but the only provisions of the settlement made void by the section are those that tend to prevent the tenant for life from exercising the powers of the Act. Thus if there be a limitation of an estate to A. for life, or till he shall alienate his life estate, A. can exercise all the powers, including the power of sale, conferred by the S. L. Acts over the "settled land" without incurring a forfeiture; but, on the other hand, if he sells his life interest so as to incur a forfeiture, he is no longer tenant for life within the meaning of the S. L. Acts. If A. be tenant for life of settled land, and an annuity be given to him by B.'s will, payable to him until he exercises any of the powers of the S. L. Acts over the settled land, he can exercise the powers without forfeiting his interest in the annuity.

Persons having powers of tenant for life.

By S. L. A. 1882, s. 58, each of the following persons, while his estate is in possession (*ante*, p. 406), has the same powers as a tenant for life, viz., (1) a tenant in tail (with an unimportant exception); (2) a tenant in fee simple subject to an executory gift over (*Re Morgan*, 24 Ch. D. 114); (3) a person entitled to a base fee (*b*), which means in this place not only the estate in fee simple into which an estate tail is converted when the issue in tail are barred but persons claiming estates by way of remainder are not barred (see the Fines and Recoveries Act, 1833, 3 & 4 Will. 4, c. 74, s. 1), but also every other sort of base or qualified fee (*c*); (4) a tenant for years determinable on life, not holding merely under a lease at a rent (*Re Hazle*, 26 Ch. D. 428; 29 Ch. D. 78); (5) a tenant for the life of another not holding merely under a lease at a rent; (6) a tenant for his own or any other life whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by

(*b*) Including a tenant for life thereof; *Re Morshead* (1893), W. N. p. 180.

(*c*) The learning as to base fees of the latter nature will be found in *Seymor's Case*, 10 Rep., at p. 97 *b*; Co. Lit. 1 *b*, 27 *a*; *Idle* v. *Cooke*, 2 Ld. Raym. 1144.

conditional limitation or otherwise, or to be defeated by an executory limitation gift or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose (*Re Paget*, 30 Ch. D. 161; *Re Carne* (1899), 1 Ch. 324); (7) a tenant in tail after possibility of issue extinct; (8) a tenant by the curtesy (*d*). Where a woman takes under a conveyance or will, or where she takes by descent, her husband's tenancy by the curtesy is to be considered as arising under a settlement made by the wife (S. L. A. 1884, s. 8); (9) a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy, or other event. *Re Pocock and Prankerd* (1896), 1 Ch. 302.

Where there is a trust for the payment of the surplus income to a man during his life, after payment of expenses of management and keeping down charges, he has the powers of a tenant for life under this section, even if in the event there is no surplus to be paid to him; *Re Jones*, 24 Ch. D. 583; 26 Ch. D. 736. It should be noticed that in a similar case the person entitled to the surplus rents would not be considered as "entitled to the possession or receipt of the rents and profits" under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 46; *Taylor* v. *Taylor*, L. R. 20 Eq. 297 decided on the Settled Estates Act, 1856 (19 & 20 Vict. c. 120).

Concurrent interests.

If there are two or more persons for the time being entitled, *i.e.*, beneficially entitled, under a settlement to the possession (*ante*, p. 406) of settled land for their lives, "as tenants in common or joint tenants, or for other concurrent estates or interests," they together constitute the tenant for life for the purposes of the Act, and must therefore concur in the exercise of the powers (s. 2 (6)). But neither of them can be compelled to concur; *Camden* v. *Murray*, 16 Ch. D. 161.

(*d*) *Mogridge* v. *Clapp* (1892), 3 Ch. 382.

Tenants in common in tail in possession must all concur in the exercise of the powers.

Undivided shares.

If the owners of undivided shares of land make separate settlements of their shares, or if each share is separately settled by the instrument of gift, each share is settled land within the meaning of the Act, s. 2 (10) (i.), and the tenant for life of each share can exercise over that share the powers of the Act. *Cooper* v. *Belsey* (1899), 1 Ch. 639, overruling *Re Collinge*, 36 Ch. D. 516.

Where an undivided share is settled, or where under the settlement settled land is held in undivided shares, the tenant for life of an undivided share may concur in the exercise of the powers with the owners or persons having power over the other undivided shares (s. 19). See s. 2 (10) (i.). Therefore, in the example just given the tenants for life of the several shares can concur in exercising the powers of the Act so as to deal with the entirety.

Infant.

If an infant is, or would if of full age be, tenant for life or have the powers of a tenant for life, the powers of the Act may be exercised on his behalf by the trustees of the settlement; "and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian, or next friend of the infant, either generally or in a particular case, orders" (s. 60). See *Re Newcastle*, 24 Ch. D. 129.

By s. 59, where an infant is "in his own right seised of or entitled in possession" to land, the powers of the S. L. Acts are made exercisable, as if the infant were tenant for life. See *Re Horne*, 39 Ch. D. 84; *Re James*, 32 W. R. 898.

Where persons are appointed under s. 60 to exercise the powers of the S. L. Acts on behalf of the infant, care must be taken to appoint the same persons trustees of the settlement under s. 38; for it may be held that the powers of the persons appointed to exercise the statutory powers on behalf of the infant cease on the appointment of trustees of the settlement under s. 38.

Married woman.

A married woman entitled as tenant for life, or as a person having the powers of a tenant for life, can, if she is entitled for her separate use (either by express declaration or under the provisions of the M. W. P. A. 1882), exercise the powers of the Act without her husband, and that notwithstanding that she is restrained from anticipation. If she is not entitled for her separate use, she and her husband together can exercise the powers; and she may execute any deeds, &c., necessary or proper (s. 61). It should be observed that the deed by which a married woman exercises the powers need not be acknowledged (sub-s. 5). If the married woman is an infant, the provisions of s. 60 apply to the powers exercisable by her, but do not render the concurrence of her husband unnecessary where it would be required if she were an adult.

Question whether land is settled, determined by facts at date of settlement.

The determination of the question whether land is "settled land" is governed by the state of facts and the limitations of the settlement at the time of the settlement taking effect (s. 2 (4) ) (*e*).

It will be observed that, so long as there is a tenant for life or person having the powers of a tenant for life within the meaning of s. 58, the land must necessarily be settled; but the converse is not true; for, although the land remains settled, there may be no person who can exercise the powers, and it may be impossible that any person should ever become entitled under the settlement to exercise the powers. As a simple example, consider a settlement on A. for life with remainder, subject to portions, to B., an adult, in fee simple. On A.'s death there is no person who can exercise the powers, and it is impossible that any person ever can become entitled under the settle-

(*e*) *Re Stamford*, 43 Ch. D. 84; *Re Marquis of Ailesbury* (1893), 2 Ch. 345; *Re Bective Estate*, 27 L. R. Ir. 364. The language of this sub-section is nearly the same as that of the Settled Estates Amendment Act, 1864, s. 3, which was repealed by the Settled Estates Act, 1877, s. 58, and re-enacted by s. 2. The cases on s. 2 of the Settled Estates Act, 1877, will be found collected in 3 Dav. Prec. 524, note, and Shelford's R. P. Stat., p. 643.

ment to exercise the powers; so that any sale, &c., made after A.'s death must be subject to the portions.

When powers cease to be exercisable.

Under a settlement made in any of the usual forms there will always be a tenant for life, or person having the powers of a tenant for life, until the first estate tail has been barred; but it is possible to suggest cases where it may be a question, *first*, whether there is a tenant for life "beneficially entitled *in possession*" within the meaning of the S. L. Acts, as, for example, where possession has been taken by a mortgagee who claims by title paramount to the settlement, or by the trustees of a term created by the settlement which is not for the purposes of accumulation or management (s. 58 (vi.), (ix.), and which is prior in order of limitation to the estate of the tenant for life (*f*); *second*, who is "beneficially entitled," as where, in the case of a protected life interest (*ante*, p. 340), the trustees have, after the determination of the estate of the tenant for life, gone into possession, and hold the rents on a discretionary trust for the benefit of a number of persons (*g*).

It is apprehended that as soon as the entirety of the settled land has become absolutely vested in an adult tenant in fee simple in possession (whether subject or not to a jointure or portions), either by the failure of the limitations in tail and merger of the life estate in the fee, or owing to the first estate tail having been barred, the purposes of the settlement are exhausted; so that, even if it were possible for any person to come into existence capable of exercising the powers, the land would no longer be "settled land," and the statutory powers could not be exercised over it.

Trustees of settlement for purposes of S. L. Acts.

The "trustees of the settlement" for the purposes of the S. L. Acts are "the persons, if any, who are for the time being trustees with power of sale (*h*) of settled land, or with power of consent to or approval of the exercise of such

(*f*) See another example in *Re Edwards* (1897), 2 Ch. 412.

(*g*) *Re Horne*, 39 Ch. D. 84; *Re Atkinson*, 31 Ch. D. 577.

(*h*) An implied power is sufficient; *Re Garnett Orme and Hargreave's Contract*, 25 Ch. D. 595.

a power of sale; or, if under a settlement there are no such trustees, then the persons, if any, who are by the settlement declared to be the trustees thereof for the purposes of the S. L. A. 1882" (s. 2 (8)); or if there are no such persons, then by the S. L. A. 1890, s. 16, the following persons are to be trustees of the settlement, viz. (i.) the persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale; or if there be no such persons, then (ii.) the persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not.

It will be observed that, in settlements made before the passing of the S. L. A. 1882, the trustees for sale, or with the power of consenting to the sale, are the only persons constituted by the settlement trustees for the purposes of the S. L. Acts. In settlements it is now proper to appoint certain persons trustees "for the purposes of the S. L. Acts 1882 to 1890."

Appointment of trustees where none were appointed by the settlement.

It may happen that there are no trustees of the settlement within the meaning of the S. L. Acts. This may occur in two cases: *First*, whether the settlement was made before or after the passing of the S. L. A. 1882, there may have been originally no trustees with power of sale, &c., constituted by the settlement; and, if the settlement was made since the passing of the S. L. A. 1882, it may contain no appointment of trustees for the purposes of the Act. In either of these cases the Court may, on the application of the tenant for life, or some other person interested under the settlement, appoint trustees of the settlement for the purposes of the S. L. Acts (S. L. A. 1882, s. 38). *Second*, if in a settlement made before or after the passing of the

S. L. A. 1882, there were originally trustees with a power of sale, &c., or if in a settlement made since the passing of the Act trustees for the purposes of the S. L. Acts were appointed, and in either case if such trustees fail, or if trustees appointed by the Court under s. 38 fail; in which case new trustees can be appointed under the power in the settlement or the Trustee Act, 1893, as the case may be (*ante*, p. 360); or the Court may appoint trustees of the settlement for the purposes of the S. L. Acts, under s. 38. By s. 47 of the Trustee Act, 1893 (replacing s. 17 of the S. L. A. 1890), all the powers and provisions of the Act with reference to appointment of new trustees and the discharge and retirement of trustees are to apply to and include trustees for the purposes of the S. L. Acts, 1882 to 1890.

Where the trustees fail.

If trustees of the original settlement are appointed for the purposes of the S. L. Acts, it is not necessary, for the purpose of the exercise of the powers of the Acts by a tenant for life under that settlement, to appoint trustees of the compound settlement created by the original settlement and any other instruments charging jointures or portions or falling within the provisions of the S. L. Act, 1890, s. 4. *Re Keck* and *Hart* (1898), 1 Ch. 617; *Re Du Cane* (1898), 2 Ch. 96.

Capital money is not to be paid to a sole trustee unless this is authorised by the settlement (S. L. A. 1882, s. 39); but a power to a sole trustee to sell has the effect of authorising him to receive capital money. (*Re Garnett Orme and Hargreaves Contract*, 25 Ch. D. 595.

Sole trustee.

The receipt in writing of the trustees, or, where one trustee is empowered to act (*i*), of the trustee, or of the personal representatives or representative of the last surviving or continuing trustee, is to be a good discharge (s. 40). It should be remarked that the word "representative" is not to be understood as authorising a sole executor or administrator to give a discharge, unless the settlement authorises the payment of capital money to a sole trustee.

Receipt clause.

(*i*) It is usual to empower one trustee to act for the purposes of the S. L. Acts. See *ante*, p. 357.

Indemnity, &c., of trustees.

The S. L. A. 1882, contains ample provisions (ss. 41, 42, and 43) for the indemnity and reimbursement of the trustees.

Power to Court to determine differences.

Section 44 enables the Court to give such directions as it thinks fit respecting any matter in difference between the tenant for life and the trustees respecting the exercise of any of the powers conferred by the S. L. Acts. See *Wheelwright* v. *Walker*, 23 Ch. D. 752.

Notice of exercise of powers by tenant for life.

The tenant for life is directed to give notice to each of the trustees of the settlement and to their solicitor (if he knows of such solicitor), by registered letters of his intention to make a sale, exchange, partition, lease, mortgage or charge; the letters must be posted at least one month prior to the sale, &c., or the contract for it; the number of trustees at the time of the notice must not be less than two, unless a contrary intention is expressed in the settlement. But a person dealing in good faith with the tenant for life is not concerned to inquire as to the notices; S. L. A. 1882 (s 45; see *Mogridge* v. *Clapp* (1892), 3 Ch. 382). The notice may be of a general intention to sell, &c.; and the trustees may waive notice or accept less than one month's notice; S. L. A. 1884, s. 5 (1).

It should be observed that, unless the notices are given before a contract is entered into, a contract binding the successors in title of the tenant for life cannot be made. If for any reason it is absolutely necessary to enter into a contract before giving the notices, the contract should provide that neither party shall be bound until the period of one month from the giving of the notices shall have elapsed without proceedings being taken to set aside the sale, or other subject of the contract.

In view of the provisions for the protection of a purchaser, it is not necessary for him to inquire whether any notices have been given. All that he is concerned to see is that there were, before the sale, two trustees to whom notices might have been given, unless the settlement wholly or partially dispenses with the notices.

It is the practice to insert in settlements a clause dispensing with notices (2 K. & E. 648); and see s. 7 of the S. L. A. 1890, *post* p. 424.

Tenant for life is a trustee.

A tenant for life must in the exercise of the powers conferred on him by the S. L. Acts have regard to the interests of all parties entitled under the settlement, and is in the position of a trustee towards them (S. L. A. 1882, s. 53) (*k*); but a purchaser, &c., dealing in good faith with the tenant for life, is protected (s. 54).

The result is that, although an improper sale or other transaction may be valid in favour of a purchaser, it may nevertheless, on the part of the tenant for life, be a breach of trust, for which he may be liable to the remainderman. Therefore, where the remainderman wishes to enjoy the land in specie, he may be advised to offer to purchase it for a price exceeding that which any other person will *bonâ fide* offer on a private contract; for then the tenant for life, if he declines to sell to the remainderman, and sells to a person making a lower offer, will be compelled to make good the deficiency out of his own assets (see *ante*, p. 120).

Duty of trustee for sale.

It is the duty of a trustee for sale, and therefore of a tenant for life when he sells, to ascertain the real value of the property, and for that purpose, if necessary, to employ an experienced person to furnish him with a valuation. (See *Oliver* v. *Court*, 8 Pri. 127; and as to the duties of trustees for sale, Dart, V. & P. chap. ii.; Lewin on Trusts, chap. xviii., p. 483 et seq.; and as to their statutory powers see the Trustee Act, 1893, ss. 13 to 16.)

Mansion-house.

The tenant for life cannot exercise the statutory powers of sale, exchange, or leasing over "the principal mansion-house and the pleasure-grounds and park and lands (if any) usually occupied therewith," without the consent of the trustees or an order of the Court. But where a house is usually occupied as a farmhouse, or where the site of the

(*k*) *Re Earl of Radnor*, 45 Ch. D. 402; *Sutherland* v. *Sutherland* 1893), 3 Ch. 169; *Bruce* v. *Ailesbury* (1892), App. Cas. 356; *Chandler* v. *Bradley* (1897), 1 Ch. 315.

house and the pleasure-grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres, the house is not a principal mansion-house within this provision; S. L. A. 1890, s. 10 (repealing S. L. A. 1882, s. 15).

"Principal" does not necessarily imply that there must be more than one house on the estate, in order to bring the clause into operation.

Although the S. L. Acts contain no express declaration that this provision is subject to the expression of a contrary intention in the settlement, a clause expressly authorising the exercise of the powers over the mansion-house, &c., without the consent of the trustees or order of Court, will be valid under S. L. A. 1882, s. 57, as the effect will be to confer on the tenant for life a power "additional to or larger than" those conferred by the S. L. Acts. It will generally be found advisable to insert the clause in question. (See form in 2 K. & E. 642.)

Powers of tenant for life.

The powers conferred by the S. L. A. 1882 on the tenant for life include:—

(1.) A power to sell the settled land or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; s. 3 (i.).

(2.) Where the settlement comprises a manor, a power to sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of mines or minerals or rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; s. 3 (ii.).

(3.) A power of exchange, with power to take or give money for equality, s. 3 (iii.); and to reserve or grant an easement, S. L. A. 1890, s. 5.

(4.) A power of partition, with power to take or give money for equality, s. 3 (iv.), and to reserve or grant an easement, S. L. A. 1890, s. 5. This

power is assisted by S. L. A. 1882, s. 19; see *ante*, p. 411.

(5.) A power to lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; s. 6; with power to make a lease for giving effect to a contract for making a lease or to a covenant for renewal when the contract or covenant was entered into by a predecessor in title of and is binding upon the tenant for life, s. 12 (i.) (ii.) (*l*); or for confirming a previous void or voidable lease, so that the confirmed lease be such as might at the date of the original lease have been lawfully granted; s. 12 (iii.).

(6.) A power to accept a surrender of a lease with or without consideration; s. 13.

(7.) A power to grant licences to copyholders to make leases; s. 14. See *ante*, p. 396.

(8.) A power, in connection with a sale or lease for building purposes, to cause any parts of the settled land to be laid out for streets, roads, paths, squares, gardens, or other open spaces, and to vest the same in trustees or in a company or public body; s. 16.

(9.) A power on a sale, exchange, partition, or mining lease to deal with the surface and minerals separately, and with or without a grant or reservation of powers of working, easements, &c., relative to mining purposes, and to make an exchange or partition subject to, and in consideration of, the reservation of an undivided share in mines or minerals; s. 17.

(10.) A power to raise on mortgage of the settled land money required for enfranchisement or equality of exchange or partition; s. 18.

(11.) A power, where he is tenant for life of an undivided share, to concur with the persons entitled to or

(*l*) This power is enlarged by S. L. A. 1890, s. 7, *post*, p. 424; and as to mining leases see S. L. A. 1890, s. 8.

having power over the other shares in exercising the powers of the Act; s. 19. See *ante*, p. 411.

(12.) A power by deed to convey the settled land, including copyholds or leaseholds vested in trustees, and to convey or create easements, to carry out any sale, exchange, partition, lease, mortgage, or charge; s. 20.

(13.) A power to direct the manner in which capital money arising under the Act is to be paid or applied; s. 22.

(14.) A power to make, vary, and rescind contracts, to make any sale, exchange, partition, or lease, so as to bind the remaindermen; s. 31.

(15.) A power to sell heirlooms, but not without an order of Court; s. 37.

The Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74, enables "any sale, exchange, or lease of land in pursuance of the S. L. A. 1882, when made for the erection on such land of dwellings for the working classes, to be made at such price, for such consideration, or for such rent as, having regard to the said purpose and to all the circumstances of the case, can be reasonably obtained, notwithstanding that a higher price, consideration, or rent might have been obtained if the land were sold, exchanged, or leased for another purpose."

Express powers not abridged.

The S. L. Acts (see S. L. A. 1882, s. 56) do not "take away, abridge, or prejudicially affect" any power which, independently of the Acts, is exercisable by the tenant for life, or by trustees with his consent, &c.; "and the powers of the Acts are cumulative;" but in case of conflict (*m*) between the provisions of the settlement and the S. L. Acts, relative to any power conferred on the tenant for life by the Acts, the provisions of the Acts prevail, so that the consent of the tenant for life, or (under the S. L. A. 1884, s. 6 (2)) the consent of one of two or more persons constituting the

(*m*) *I.e.* by powers being given to the trustees by the settlement for the same purpose as those given by the Act to the tenant for life.

tenant for life, is necessary to the exercise of any express power conferred on the trustees "exercisable for any purpose provided for by" the S. L. Acts. For example, suppose that the trustees have a power of sale, with a direction that the proceeds are to be reinvested in land to be settled to the uses of the settlement; this is a power exercisable for the purposes of the Acts; and accordingly the consent of the tenant for life is required to the exercise of it. On the other hand, if they have a power to mortgage for the purpose of paying off charges (and possibly a power to sell), this is not a power exercisable for the purposes of the Acts, and accordingly it appears that the trustees can exercise it without the concurrence of the tenant for life.

Larger or additional powers.

Powers additional to or larger than those of the S. L. Acts may be conferred on the tenant for life or the trustees, and such powers are to operate as if they were conferred by the Acts, unless a contrary intention is expressed; S. L. A. 1882, s. 57. The additional powers will, by the effect of this section, operate as statutory powers exactly in the same manner as if they had been conferred by the Acts. For example, if the settlement confers on the tenant for life power to grant leases for terms longer than those mentioned in the Acts, or authorises the granting of leases without the execution of a counterpart; in each of these cases the tenant for life may grant the lease exactly in the same manner as if these extended powers had been conferred by the Acts; but, on the other hand, if these powers are given to the trustees, the consent of the tenant for life would be necessary under s. 56.

Conveyance.

The tenant for life may convey land sold, given in exchange or on partition, leased, mortgaged or charged, and may convey or create easements sold or leased under the statutory powers (including copyholds or leaseholds vested in trustees) "for the estate or interest the subject of the settlement, to the uses and in the manner requisite for giving effect to the sale, &c."; S. L. A. 1882, s. 20. He may also make any conveyance necessary or proper for

giving effect to a contract entered into by a predecessor in title, and which, if made by such predecessor, would have been valid as against his successors in title; S. L. A. 1890, s. 6 (*n*).

The powers conferred on the tenant for life by these sections are sometimes called Common Law authorities: but they are more properly called statutory authorities. They enable him to convey all the interest in the land that is settled, whether it be vested in trustees or not, and whether it be freehold or leasehold. They also enable the tenant for life by his conveyance to confer the right to be admitted to copyholds without a surrender being made. It must be remembered that these powers differ entirely in their operation from the express powers of sale, &c., formerly inserted in a settlement, a conveyance under which took effect as the appointment of the use. *Ante*, p. 393.

Effect of conveyance by tenant for life where there are charges on the fee.

The S. L. A. 1882, s. 20 (2) provides that a conveyance by deed made by the tenant for life under the statutory powers shall pass the land conveyed discharged from all the limitations powers and provisions of the settlement, and from all estates, interests and charges subsisting or to arise thereunder (*o*), but subject to and with the exception of (i.) estates, interests, and charges, having priority to the settlement; (ii.) other estates, interests, and charges conveyed or created "for securing money *actually raised* at the date of the deed"; (iii.) leases, easements, &c., granted or agreed to be granted before the date of the deed "for value in money or money's worth," under the settlement or any statutory power. It will be observed that this provision is similar to that usually inserted in the express power of sale, which authorised the revocation of the uses declared

(*n*) Apparently this section does not apply to leases. *Re Kemeys Tynte* (1892), 2 Ch. 211. See the corresponding provision as to leases, S. L. A. 1882, s. 12.

(*o*) This enables the tenant for life to convey the land free from jointures and portions not actually raised; *Re Keck & Hart*, (1898) 1 Ch. 617; and also without the consent of persons claiming under instruments falling within the provisions of S. L. A. 1890, s. 4; *Re Du Cane*, (1898) 2 Ch. 96.

by the settlement or to be created under the powers of charging jointures or portions, but made the conveyance subject to all mortgages and leases created under the trusts or powers of the settlement (*p*).

We proceed to the more particular consideration of the powers of leasing and sale.

Power to lease.

Either the settled land or any easement over it may be leased under the statutory power; and the lessee need not be made impeachable for waste (S. L. A. 1882), s. 6, except in cases falling within the provisions of S. L. A. 1890, s. 7 (*pp*). The term must not (except in cases within s. 10; see *infra*) exceed, in the case of a building lease, ninety-nine years, in the case of a mining lease sixty years, and in the case of any other lease twenty-one years (s. 6). The lease must be made by deed, and must take effect in possession not later than twelve months (which means calendar months; Interpretation Act, 1889, s. 3) after its date, and the rent must be the best that can reasonably be obtained (*q*), having regard to any fine that is taken, &c. It must contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days. A counterpart is to be executed by the lessee, and delivered to the tenant for life; but the execution of the lease by the tenant for life is sufficient evidence of this having been done. A statement contained in a lease, or in an indorsement thereon, signed by the tenant for life respecting any matter of fact, or calculation, under the S. L. Acts, is in favour of the lessee and those claiming under him to be conclusive. (S. L. A., 1882, s. 7.) The tenant for life may contract to make a lease; s. 31 (1) (iii.); which contract is enforceable by and against every of his successors in title, s. 31 (2); and in making the lease may vary the terms with or without

(*p*) See 1 K. & E. 471; and the discussion as to the priority of powers, 3 Dav. Pre. 591; Co. Lit. 271 *b*, note (1), VII. (2); Sugd. Pow. 482 *et seq.*, 488 *et seq.*; Farw. Pow. chap. xiv.

(*pp*) See 37 Sol. J. 76.

(*q*) See *Sutherland* v. *Sutherland* (1893), 3 Ch. at p. 195; *Re Chawner* (1892), 2 Ch. 192.

consideration, s. 31 (1) (iii.); and, if he makes a new lease on the surrender of an existing lease, he may take into account the value of the surrendered lease; s. 13 (5).

A lease at rack-rent for a term not exceeding twenty-one years, and whereby the lessee is not exempted from punishment for waste (*r*), may be made by a tenant for life, notwithstanding that no notice is given to the trustees by the tenant for life, or that there are no trustees of the settlement for the purposes of the S. L. Acts; and such a lease may be made by writing under hand only where the term does not exceed three years from the date of the writing; S. L. A. 1890, s. 7 (*s*).

Building and mining leases.

Special provisions as to building and mining leases will be found in ss. 8 to 11 of S. L. A. 1882, and in S. L. A. 1890, s. 9, and in S. L. A. 1889, s. 2 (under which an option of purchase to be exercised within 10 years, may be inserted in a building lease). The most important of these are the provision in s. 8 of S. L. A. 1882, that a peppercorn rent, or a rent less than that ultimately payable, may be reserved in a building lease during the first five years or any less part of the term; and the provision in s. 11 as to mining leases, that, unless a contrary intention is expressed in the settlement (*Re Newcastle*, 24 Ch. D. 129), three-fourths of the rent, if the tenant for life is impeachable for waste in respect of minerals, and one-fourth if he is not, is to be set aside as capital money. It is therefore proper, if so intended, to insert in the settlement a declaration that the whole of the rent under a mining lease is to be treated as income. The Court is empowered to authorize the tenant for life to make leases or grants for building or mining purposes for any term or in perpetuity at fee farm or other rents, where it is shown, with respect to the district in which the land is situate, either (i.) that it is the custom of the district to make such leases or grants, or (ii.) that it is difficult to make building or mining leases except for a longer term or on other

(*r*) See 37 Sol. J. 76.

(*s*) As to inserting a covenant for renewal, see *Re Farnell*, 33 Ch. D. 599; *Gas, Light & Coke Co.* v.

conditions than those specified in the Act in that behalf, or in perpetuity; S. L. A. 1882, s. 10.

If the settlement does not contain a provision authorizing the payment of capital money to one trustee only, a difficulty may occur where a mining lease has been granted at a time when there were two trustees and one has subsequently died, or where the settlement contains a clause dispensing with the statutory provisions as to notices, and the lease was granted at a time when there were no trustees; for in either of these cases there will be no person able to give a receipt for the part of the rent that is to be set aside as capital money, and the lessee cannot be advised to pay that part until there are at least two trustees of the settlement.

It should be observed that, as a tenant for life who is impeachable for waste may work mines which are already open (*ante*, p. 371), he is in the same position as to such mines as if he were not impeachable for waste; and therefore, if he grants a lease of them under the power, only one-fourth of the income has to be set aside.

Power of sale.

The tenant for life may sell the settled land or any easement, &c., over it (S. L. A. 1882, s. 3), at the best price that can reasonably be obtained (*t*), either in one lot or in several lots, either by auction or by private contract; he may fix reserve biddings and buy in; he may sell subject to any stipulations respecting title, or evidence of title, or other things; he may (as far as the law permits) impose any restrictions as to building or other user of the land, or with respect to mines and minerals; *Ib.* s. 4. If the land sold is subject to an incumbrance, he may, with the consent of the incumbrancer, charge it on any other part of the settled land in exoneration of the land sold; *Ib.* s. 5 (*u*) (see the

*Towse*, 35 Ch. D. 519; 1 K. & E. 700.

(*t*) See, however, as to working class dwellings, 53 & 54 Vict. c. 70, s. 74, cited *ante*, p. 420.

(*u*) A rent charge created under The Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), is an incumbrance within the meaning of this section. *Earl of Strafford and Maples*, (1896) 1 Ch. 235.

form in 2 K. & E. 255). He may contract to sell and vary or rescind the contract, and the contract is enforceable by and against all his successors in title, *Ib.* s. 31, and S. L. A. 1890, s. 6; *ante*, p. 422. He may sell surface and mines or minerals separately, and with or without powers of working and way-leaves, &c.; *Ib.* s. 17. The purchase money must be paid, at his option, either to the trustees of the settlement or into Court; and in the former case is to be invested or applied by the trustees according to his direction (*x*), and in default thereof, at the discretion of the trustees, subject to any consent required, or direction given by the settlement with respect to the investment or other application of the trust money. The investment by the Court is to be made on the application of the tenant for life or the trustees. But capital money paid into Court may be paid out to the trustees; S. L. A. 1890, s. 14. The investment is not to be altered during the life of the tenant for life without his consent; S. L. A. 1882, s. 22.

Capital money.

The proceeds of sale, and other capital money arising under the Act and investments thereof are to devolve as land in the same manner as the land from which the money arises would, if not disposed of, have devolved; and the income of the investments is to be applied as the income of the land would have been applicable if it had not been sold; s. 22. It is doubtful whether money merely made applicable as if it were capital money arising under a settlement becomes equitably converted into real estate for the purpose of transmission (see 2 K. & E. 571: W. B. & C., 346) unless it is impressed with a trust for investment in the purchase of land.

Investments.

The investment of capital money is provided for by S. L. A. 1882, s. 21. Subject to any claims properly payable out of the money and to its application for any special object for which it was raised, it is to be applied in any of the following modes:—

(*x*) This direction if given honestly and in good faith cannot be controlled by the Court or the trustees. *Re Lord Coleridge's Settlement*, (1895) 2 Ch. 704.

(i.) In investment on Government securities or other securities authorised by the settlement or by law (see *ante*, p. 323), or bonds, mortgages, debentures or debenture stock of any railway company in the United Kingdom, incorporated by special Act, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares.

(ii.) The discharge, purchase, or redemption of incumbrances affecting the inheritance or other interest which is settled (*y*); or of land-tax, tithe rent-charge, Crown rents, chief rents or quit rents payable out of the settled land.

(iii.) Payment for improvements authorised by the S. L. Acts (*z*).

(iv.) Payment for equality of exchange or partition;

(v.) The purchase of the seignory of settled freeholds or the purchase of the fee simple of settled copyholds (*a*);

(vi.) The purchase of the reversion in fee of settled leaseholds;

(vii.) The purchase of land in fee simple, or of copyhold land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of minerals, or mineral rights;

Having regard to the meaning of "land" (see S. L. A. 1882, s. 2 (10) (i.), and Interpretation Act, 1889, s. 3), this

(*y*) This includes a mortgage of a long term derived out of the fee, *Re Frewen*, 38 Ch. D. 383; or a mortgage of leaseholds by subdemise; and by S. L. A. 1887, it includes a terminable improvement charge. Capital money arising from one part of the settled estate may be applied in discharge of incumbrances on another part, though the two parts may devolve differently; *Re Freme* (1894), 1 Ch. 1.

(*z*) See S. L. A. 1882, s. 25; S. L. A. 1887; S. L. A. 1890, s. 13; The Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74.

(*a*) *I.e.*, enfranchisement: for enfranchisement of a copyhold is, in fact, the conveyance to the copyholder of the lord's freehold estate so as to merge the copyhold estate.

authorises the purchase of an easement (*e.g.*, a right of way) to be annexed in enjoyment to the settled land (and see sub.-s. viii., *infra*). The land purchased must not be out of England, unless the settlement authorises such a purchase; S. L. A. 1882, s. 23.

(viii.) The purchase in fee simple, or for a term of sixty years or more, of mines and minerals, or of any easement, right or privilege, convenient to be held with the settled land for mining or other purposes;

(ix.) Payment to a person absolutely entitled, or empowered to give an absolute discharge;

(x.) Payment of costs, &c., of or incidental to the exercise of the powers of the S. L. Acts;

(xi.) Any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

Settlement of purchased land.

By S. L. A. 1882, s. 24, freeholds purchased are to be conveyed to the uses, &c., which, under the settlement or by the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase charges, or powers of charging; and copyholds or leaseholds are to be conveyed to and vested in "the trustees of the settlement" on trusts, &c., corresponding as nearly as the law and circumstances permit, with the uses, &c., to which freehold land is to be conveyed as aforesaid; so, nevertheless, that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go. And the purchased land may be made a substituted security for any charge in respect of money actually

(*b*) Land purchased with money representing the sale of heir-looms is not subject to charges of jointures and portions charged on the settled land. *Re Duke of Marlborough* (1897), 1 Ch. 712.

raised and remaining unpaid from which the settled land or any part thereof has been released on the occasion of a sale, &c. (*b*).

Analysis of strict settlement since 1882.

Here follows an analysis of a strict settlement, made after 1882, of the husband's property on his marriage, where he is seised in fee (see form in Stud. Prec. 85). This should be carefully compared with the analysis of a similar settlement made before 1882, *ante*, p. 365.

Parties : A. B. (*intended husband*) (1) ; C. D. (*intended wife*) (2) ; P. T. and Q. T. (*trustees*) (3).

Recitals :

(1.) The intended marriage.

(2.) Narrative recitals where necessary, showing the state of the title.

(3.) Agreement for settlement.

Operative clauses :

(1.) Grant by A. B. "as settlor" (*c*) to P. T. and Q. T.

(2.) Parcels.

(3.) Habendum to P. T. and Q. T. "and their heirs," or "in fee simple," to the use of A. B. "and his heirs," or "in fee simple," until the intended marriage ; and afterwards

(4.) To the use that C. D. shall receive a yearly rent-charge during the joint lives of herself and A. B., without power of anticipation, as pin-money ;

(5.) To the use of A. B. for life ;

(6.) To the use that C. D. shall receive a yearly rent-charge for her jointure ;

(7.) To the use of P. T. and Q. T. for 1,000 years (the portions term) ;

(8.) To the use of the sons of the marriage successively in tail, using the words "in tail," or "heirs of the body ;"

(9.) To the use of the daughters of the marriage as

(*c*) Or the settlor may convey "as beneficial owner" if it be desired to imply full covenants for title under C. A. 1881, s. 7.

tenants in common in tail, using the words "in tail," or "heirs of the body," with cross remainders between them;

(10.) To the use of A. B., "his heirs and assigns," or "in fee simple."

(11.) Trusts of the portions term.

(12.) Power to the husband to jointure a future wife.

(13.) Power to the husband to charge portions for the children of a future marriage.

(14.) Clause appointing P. T. and Q. T. trustees for the purposes of the C. A. 1881, s. 42, and modifying statutory minority clause.

(15.) (Provision modifying S. L. Acts as to mining rents).

(16.) (Provision modifying S. L. Acts as to sale or lease of mansion-house).

(17.) (Clause extending powers of investment under the S. L. Acts).

(18.) Provision as to notices under the S. L. Acts (*d*).

(19.) Covenant by A. B. "as settlor," (*e*) to surrender copyholds to P. T. and Q. T., upon trusts corresponding with the uses of the freeholds.

(20.) Assignment of leaseholds by A. B. "as settlor" (*e*) to P. T. and Q. T., upon trusts corresponding, as nearly as the nature of the property admits, with the uses of the freeholds.

(21.) Assignment and trusts of heirlooms.

(22.) Appointment of P. T. and Q. T. as trustees for purposes of the S. L. Acts, 1882 to 1890.

(23.) Clause supplemental to statutory provisions as to appointment and indemnity of trustees.

## PART IV.—NEGOTIATION AND PREPARATION OF A SETTLEMENT.

Negotiation.

§ When a gentleman becomes the accepted suitor of a lady some general information is given by him to her relations

(*d*) See for other provisions with reference to the S. L. Acts, the form in 2 K. & E. 660.

(*e*) Or "as beneficial owner," *ante*, p. 429 *n.*

as to his fortune and expectations; while they give him similar information as to her position. A detailed statement of the lady's fortune is afterwards furnished by her solicitor to the gentleman's solicitor; "fortune" including not only the fortune which actually belongs to her, but also the property intended to be settled on her behalf. The gentleman's solicitor then prepares the "Proposals for the Settlement." This document contains a statement of the nature and amount of the property proposed to be settled on behalf of the gentleman, a copy of the statement of the lady's fortune, the nature of the provisions that the gentleman's solicitor thinks proper to have inserted in the settlement, and the names of trustees proposed on behalf of the gentleman, leaving a blank to be filled up by the lady's solicitor for the names of the trustees on her behalf —the general rule being that an equal number should be nominated on each side. In case any part of the property is held by title—as, if it be land, or an interest under a marriage settlement—the proposals should also state what title or evidence of title is proposed to be shown. The proposals are considered as forming a basis for negotiations, and as, therefore, liable to be altered by the lady's advisers.

Proposals for the settlement.

There is, perhaps, no duty ever performed by a solicitor that calls for the exercise of greater tact and discretion than the negotiation of a marriage settlement. It must be remembered that it is impossible, if unreasonable propositions are made, to defeat them by the threat of breaking off the negotiations; and that the clients are generally so ignorant of the nature of a settlement that they are unable to see the objects which their advisers are aiming at.

Tact required in the negotiations.

Occasionally, when the intended husband and wife are not of the same religion, a promise is given by the husband to allow some or all of the children to be brought up in the wife's religion. However binding such a promise may be in honour, its performance cannot be enforced during the

Religion.

lifetime of the father (*Andrews* v. *Salt*, L. R. 8 Ch. 622; *Re Agar-Ellis*, 10 Ch. D. 49); but after the death of the father, if it is alleged to be for the benefit of the infant to be educated in the mother's religion, the fact of his having promised the mother that the children should be educated in her religion is a matter of weight (*g*). A promise of this nature should not be inserted in the settlement. If the parties wish to have the solemnity of a deed, the arrangement can be expressed in a short separate instrument.

Points for consideration in negotiation of settlement of personalty.

The more important points for consideration in the negotiation of settlements of personalty are the following:—

1st. What amount of property is to be brought into settlement on each side.

2nd. Who is to take the first life interest in the wife's fortune. Whether the husband's life interest is to be made determinable on bankruptcy, &c.; and, if so, whether there is to be a discretionary trust in his favour. Although it is the usual practice to give to the husband the first life interest in his own fortune, it may deserve consideration, in a case where he is engaged in trade, whether it may not be better to give it to the wife; or, if this be objected to, whether it may not be given to the wife subject to a discretionary trust in favour of the husband (*ante*, p. 340).

3rd. Whether the trusts for the children are to be in the usual form, or an eldest son is to be excluded in the event of his succeeding to an estate.

4th. If the settled property is reversionary, how an immediate income is to be provided.

5th. Whether the husband is to insure his life.

6th. What investments are to be authorised.

(*g*) See *Re Clarke*, 21 Ch. D. 817; *Re Scanlan*, 40 Ch. D. 200; *Re McGrath* (1893), 1 Ch. 143. The welfare of the infant is the paramount consideration, and in a proper case the court will deprive a father of the custody of his children and disregard his wishes as to religious instruction. *Re Newton* (1896), 1 Ch. 740.

7th. Whether the after-acquired property of the wife is to be settled.

8th. Whether any special provisions are to be made in the event of either the husband or wife marrying again.

There are also a few minor points to be attended to. As a general rule the settlement should not include all the property belonging to the gentleman and lady; for it must be remembered that they will probably have to furnish a house, and to incur other large expenses in the first year of the marriage; and, even if the gentleman has already a house and establishment, he will have to pay for the settlement, and it is desirable that he should have something in hand to meet abnormal expenses. In the case of a widower or widow care must be taken not to settle such large sums on the issue of the intended marriage as to be unfair towards the issue of any former marriage of either the gentleman or lady; and if such issue be not already provided for, it is but reasonable to make some provision for them (*h*).

Is land to be put into strict settlement or not.

Where the property to be settled is land, a preliminary question arises, whether it is to be put into strict settlement, or to be settled as personalty (*ante*, p. 311). In the former case, if it be the property of the gentleman, the only questions for consideration by the lady's advisers are the amount of the pin-money, jointure, and portions; the order of the limitations in tail being generally left to the discretion

Strict settlement.

(*h*) Provisions by a widow on her second marriage in favour of her children by a former marriage have been held valid, though such children are not within the marriage consideration; *Gale* v. *Gale*, 6 Ch. D. 144; but in the case of a widower they have been held to be defeated by the effect of 27 Eliz. c. 4 (*ante*, p. 72); *Re Cameron and Wells*, 37 Ch. D. 32. Recent decisions have laid down the principle that where such provisions are supported, it is not upon the ground of consideration or of the intention or contract of the parties, but because they could not be defeated without defeating the interests of persons who are within the marriage consideration; *Mackie* v. *Herbertson*, 9 App. Cas. 303; *De Mestre* v. *West* (1891), A. C. 264, explaining *Newstead* v. *Searles*, 1 Atk. 264 (S. C. 9 App. Cas. 320 n.) and *Clayton* v. *Ld. Wilton*, 6 M. & S. 67.

of the husband's advisers. Care should be taken not to charge the estate with so large an amount for portions, when compared with its value (*ante*, p. 378), that it will have to be sold when the portions become payable. In case the property is already incumbered, it deserves consideration whether it may not be advisable for the husband to insure his life, for the purpose of providing, in part at least, for the portions. (See *ante*, p. 378.)

Where the gentleman has an estate intended to be put into strict settlement, and the lady has a fortune consisting of personalty, it was formerly the practice, unless her fortune was very large indeed, not to settle it, so that her husband took it *jure mariti*, provision being made for her by means of pin-money and a jointure charged on his estate. The modern practice in such a case is to settle the lady's fortune upon the usual trusts of a settlement of personalty, with the variation that if any younger child attains a vested interest the eldest is excluded (*ante*, p. 346).

Marriage of female infant.

Where at the time of her marriage, a woman is an infant, but the husband has attained majority, the settlement, though not binding on her, is binding on him to the extent of the interest that he would have taken in her property, if no settlement had been made (*ante*, p. 300); but there is not, and was not prior to 1883, any manner of binding the infant wife, except by making an application to the Chancery Division under the Infant Settlement Act, 1855, (18 & 19 Vict. c. 43). By this Act an infant, being a male not under twenty, or a female not under seventeen, is enabled to make a binding marriage settlement with the approval of the Court (*Re Sampson and Wall*, 25 Ch. D. 482); but the Court cannot compel such a settlement to be made (*Re Leigh*, 40 Ch. D. 290).

Before M.W.P.A. 1882.

A settlement made on the marriage of a female infant before 1883, operated as a settlement by the husband in respect of all property comprised in it to which he might become entitled in her right. According to the decisions (*ante*, 305) as to the effect of the M. W. P. A. 1882, on

settlements, a settlement made on the marriage of a female after 1882 apparently operates as a settlement by the husband in respect of all property comprised in it to which he might have become entitled in her right if the M. W. P. A. 1882, had not been passed. Such a settlement, therefore, binds her chattels personal in possession (*Simson* v. *Jones*, 2 Russ. & M. 376), her leaseholds (*ante*, p. 301 : *Trollope* v. *Linton*, 1 Sim. & St. 477), and her choses in action if reduced into possession during the coverture (*ante*, p. 302), or if the husband survives the wife (*ante*, p. 302); and it has been held that a transfer to the trustees of her settlement is a sufficient reduction into possession (*Cuningham* v. *Antrobus*, 16 Sim. 436). On the other hand, if she survives her husband, it does not bind her choses in action not reduced into possession during the coverture (*Ellison* v. *Elwin*, 13 Sim. 309; *Borton* v. *Borton*, 16 Sim. 552), even if it was impossible to reduce them into possession owing to their remaining reversionary during the coverture (*Cuningham* v. *Antrobus*, 16 Sim. 436); nor does it bind property settled to her separate use (*Simson* v. *Jones*, 2 Russ. & M. 365; *Johnson* v. *Johnson*, 1 Keen 648), because the husband takes no interest in it. The infant wife was not bound by a settlement, on marriage before 1883, of her real estate, because the husband took only a limited interest in it. But the husband was not allowed to concur with the wife in making any disposition for the purpose of defeating the settlement. (*Milner* v. *Harewood*, 18 Ves. 259; *Durnford* v. *Lane*, 1 Bro. C. C. 106.)

Election.

Where a settlement is not binding on the wife, it is generally to her interest to elect to take under it, whether the husband brings any property into settlement or not. A clause is, however, often inserted in the settlement on the marriage of a female infant, expressly putting her to her election on attaining twenty-one to affirm the settlement if requested by the trustees, or to forfeit her interest under it. But, even in the absence of such a provision, she cannot take any benefits under the settlement out of the property (whether originally

belonging to her or not) which is bound by the settlement, and at the same time repudiate it, so far as regards property belonging to her which, though in terms included in the settlement, is not bound by it. (*Willoughby* v. *Middleton*, 2 J. & H. 344; *Wilder* v. *Pigott*, 22 Ch. D. 263; *Greenhill* v. *North British &c. Insurance Co.* (1893), 3 Ch. 474; *Re Hodson* (1894), 2 Ch. 421; see also *Harle* v. *Jarman* (1895), 2 Ch. 419.) A similar case of election arises against the wife's heir-at-law (*Brown* v. *Brown*, L. R. 2 Eq. 481), and next-of-kin (*Savill* v. *Savill*, 2 Coll. 721).

Transfer of trust funds belonging to infant wife to the trustees of her settlement.

Where personalty belonging absolutely to a female infant was held by trustees at the time of her marriage before 1883, and was settled by the settlement made on her marriage, the trustees who held it could safely transfer it to the trustees of her settlement; for the whole transaction amounted to a receipt or reduction into possession by the husband, and a settlement by him, by which the wife was bound; and, if the marriage takes place after 1882, the rule appears to be the same (*Stevens* v. *Trevor-Garrick* (1893), 2 Ch. 307).

Lady's solicitor prepares the settlement.

It is the duty of the lady's solicitor to prepare the settlement. This rule creates some inconvenience in the case of a strict settlement; for, as the gentleman's solicitor knows the circumstances of the estate, he is better able to advise as to the necessary powers for management, &c., than the lady's solicitor.

Case of a family resettlement on the marriage of a son.

In the common case of a father tenant for life, and his son, tenant in tail, joining in barring the entail, and making a fresh settlement on the marriage of the latter, the difficulty is usually met by proposing on the gentleman's behalf that the resettlement should contain powers of jointuring and charging portions. In this case the resettlement is prepared by his family solicitor, while the deed by which the powers of jointuring and charging portions are exercised is prepared by the lady's solicitor (*post*, chap. xiii., RESETTLEMENTS).

Power to raise costs of settlement.

Occasionally, when the gentleman is likely to be short of ready money at the time of his marriage, a clause is inserted

in the settlement directing the trustees to raise and pay the costs of the negotiation and preparation of the settlement out of the trust funds (*i*).

Costs of a marriage settlement.

The practice is for the husband to pay the lady's solicitor his costs of the negotiation and preparation of the settlement, on the grounds laid down in *Helps* v. *Clayton*, 17 C. B. N. S. 553 (*k*), where it was decided—*first*, that the liability of the husband to pay the lady's solicitor is a legal liability arising out of the ordinary course of business, by which in such a case the solicitor employed on the part of the lady is to prepare the settlement, and the husband has to pay his bill; *secondly*, that it is not a direct liability to the lady's solicitor, but only a liability to reimburse the expense of the settlement which the lady or her father or person *in loco parentis* may have incurred; *thirdly*, that as between the lady and her father (*l*) the solicitor is *her* solicitor, so that she is liable to the solicitor, although the father may have actually instructed him, and all that she has done is to to execute the settlement; and *fourthly*, that a settlement is a necessary for a female infant, so that she can bind herself by a contract of retainer to a solicitor to act for her in the negotiation and preparation of it.

Married Women's Property Act.

The M. W. P. A. 1882, s. 13, renders a married woman liable to the extent of her separate property for all debts, contracted before marriage: and s. 19 prevents any restriction against anticipation contained in a settlement of her own property from having any validity against debts contracted by her before marriage. It does not appear that the Act has made any change in the husband's liability to pay the costs of the settlement; but the Act enables the wife's solicitor to recover his costs from her (s. 13).

(*i*) As to costs of a settlement made with the sanction of the Court, see *De Stacpoole* v. *De Stacpoole*, 37 Ch. D. 139.

(*k*) See to the same effect, *Re Lawrance, Bowker* v. *Austin*, (1894), 1 Ch. 556.

(*l*) The father is the natural person to advise his daughter as to the provisions to be inserted in her settlement; *Tucker* v. *Bennett*, 38 Ch. D. 1.

It is the practice of some solicitors, when acting for the wife, in order to avoid the possible risk of any dispute as to the liability of the husband to pay the costs of the settlement, to inquire in the course of the negotiations, whether he will do so according to the usual practice.

## CHAPTER XII.

### WILLS.

Difficulty in framing a will.

THE preparation of an intricate will is perhaps the most difficult task ever undertaken by a draftsman. A will does not take effect from its execution, but from the death of the testator; and therefore the draftsman has to consider, not only the circumstances of the testator at the time when the will is prepared, but also what they may possibly be at the time of his death. Nothing but experience and a well cultivated imagination will enable even an accomplished lawyer to settle an intricate will in a satisfactory manner.

Folly of testators who make their own wills.

Nevertheless, many testators insist on making their own wills. A man ignorant of law would be considered exceedingly foolish if on purchasing a house he were to attempt to draw the conveyance himself; and yet this task is easy compared to that of framing a will properly providing for his wife and children. It is very difficult to find words sufficiently strong to express one's sense of the folly and selfishness of a testator who prepares his own will —*folly*, because of the very strong probability that he will fail in expressing his intentions correctly; and *selfishness*, because, for the sake of saving himself the costs of having his will properly prepared, he runs the risk of throwing on his family the expenses of legal proceedings for the purpose of ascertaining the meaning of his words—proceedings which often give rise to irreconcilable family quarrels.

Suggestions to a solicitor taking instruction for a will.

The advice to be given to a testator should be founded on the assumption that he intends to make a perfectly just will, one on which he can look with satisfaction on his death-bed; that he intends to disregard all family quarrels;

and that he will not act under the influence of caprice. He should be advised to make a list of his property, stating its probable value. He should be asked if he is in the habit of saving or of living up to his income, as in the former case his residuary legatee may be benefited to a much larger extent than he intends; his marriage settlement, if any, should be inspected, and it should be ascertained whether, under that settlement or under any other instrument, he has power to appoint any and what property. Where he states himself to be the owner of land, it should be ascertained whether this is really the case, or whether he has only a limited interest in it as tenant for life or otherwise, and what is the tenure of the land. The circumstances of his family, that is, not only the number, but also the position of the children or other issue should be inquired into. If any of his daughters are married, inquiry should be made what settlements, if any, were made on their marriages; and the effect of the covenants for settling their after-acquired property on the provisions proposed to be made for them by the testator's will should be considered. (See a detailed list of questions in 2 Jarm. Wills, Appendix.) A testator should be discouraged from making an elaborate will. It is sufficient if he makes a will that is proper under the existing circumstances of his family and fortune. It is not necessary, as in the case of a settlement, which cannot be altered, to provide against every possible contingency; for, if circumstances change, a new will may be made. A testator whose circumstances warrant his taking much trouble in the disposal of his property should be advised to reconsider his will with respect to the altered circumstances of his family after the lapse of every few years, and with respect to the amount of the gifts contained in it in case of loss or accession of fortune.

Clauses that should not be inserted. Statement as to

Before passing to the consideration of the usual provisions of a will, we may point out some clauses that ought not to be inserted. In old wills we often find a long statement of the testator's opinion on religious subjects, sometimes even

going to the extent of making a bequest of his soul to the Almighty; but this practice has now become excessively rare, and is of course never adopted where the will is prepared under professional advice. religious belief

There is a popular belief that, if a testator disinherits his heir-at-law, he is bound to leave him a shilling; hence the phrase "to cut off the heir with a shilling." This is one of the many instances where the old Roman law has been handed down by tradition. According to that law, as modified by Justinian (Inst. Lib. ii. Tit. xviii. *De Inofficioso Testamento*), a will which was at variance with the dictates of natural affection was called "inofficious;" and accordingly, if a relation within a certain degree was entirely disinherited, he could maintain the action "*de inofficioso testamento*" for the purpose of setting aside the will; but originally the smallest gift would prevent him from maintaining the action. It need hardly be pointed out that, as there is in English law no action analogous to the Roman action "*de inofficioso testamento*," it is unnecessary to mention the heir when it is intended to disinherit him; and, as the gift of a shilling is an unnecessary insult, it ought never to be inserted. For the like reason it appears to be inadvisable to state the reasons which have caused the testator to leave his property away from the heir; unless indeed the reason for doing so is that the heir is already, in the testator's opinion, sufficiently provided for. Gift of a shilling to the heir.

A testator should be discouraged from expressing any wishes as to his funeral *in his will*; for it often happens that from a feeling of delicacy the family do not open the will till after the funeral. The testator should state his wishes in a letter addressed to his executors, with a direction that it is to be opened immediately after his death, unless indeed he is satisfied with making an oral statement of his wishes to one of his relations. Directions as to funeral

It appears that the executors, who cannot accurately know at the time of the funeral the amount of the testator's property, will be allowed reasonable funeral expenses, Funeral expenses.

according to the testator's condition in life, out of the assets, even as against creditors; and that, where they do not either expressly or implicitly give orders for the funeral, they will be liable only in their representative character for such expenses; but that, where they give orders for the funeral, or adopt the acts of another person who gives such orders, they will be liable personally to the undertaker, with the right of recouping themselves their reasonable expenses out of the assets. It follows that, where there are any doubts as to the sufficiency of assets, the executors should be careful not to assent to an order for an expensive funeral, even with the consent of the residuary legatees; for, as in case of deficiency of assets they will only be allowed their reasonable expenses as against the creditors, they may have to pay the excess out of their own pockets (*a*).

Analysis.

The subjoined analysis of a will indicates the general arrangement, but it is impossible to give any detailed analysis that would be useful. (See 2 K. & E. 830, and form in Stud. Prec. 119.)

1. Commencement.
2. Specific legacies.
   - (*α*.) Absolute.
   - (*β*.) Settled.
3. General legacies.
4. Annuities.
5. Specific devises.
   - (*α*.) In fee simple.
   - (*β*.) In strict settlement.
6. Residuary gift.
7. Trusts of residue.
8. Trusts of settled legacies.
9. Trustee clauses.
10. Appointment of executors and guardians.
11. Testimonium.

Commencement.

A will generally commences with a description of the

(*a*) *Bisset* v. *Antrobus*, 4 Sim. 512. Wms. Exors. pp. 835, *et seq.*; pp. 1677, *et seq.* M. L. P. P. 369.

testator; and it should be remembered that, if he has lived in different places, so that it is probable that he is described in documents relating to his property by various descriptions, it is convenient to mention them all; and if, as often happens in London, the name of the street or the number of the house in which he lives has been altered, it is convenient to refer to the alteration. Example: "I, A. B., formerly of ——, then of ——, but now of No. 10, John Street, which was formerly known as No. 20, James Street, in the parish of ——, in the county of ——." The clause proceeds, "hereby revoke all testamentary dispositions heretofore made by me, and declare this to be my last will." "Testamentary dispositions" include codicils; but the revocation of a "will" does not necessarily revoke the codicils to it, which remain in force till revoked in one of the methods pointed out in the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26, s. 20; M. L. R. P. 403; M. L. P. P. 358; *Re Savage*, L. R. 2 P. & D. 78.)

Revocation of prior will.

It is proper always to insert a clause of revocation, for cases have occurred where a document entitled "a last will and testament" has been admitted to probate *conjointly* with a former will, a result generally not in accordance with the testator's wishes. (Wms. Exors. pp. 137, *et seq.*) The clause of revocation is occasionally placed at the end of the will, which may in this case begin "This is the will of ——."

"Will," "devise," "testament," "bequeath."

The words "will" and "devise" are generally taken to refer to real estate, "testament" and "bequeath" to personalty; and although in practice the word "will" is used for "testament," the skilful draftsman always employs the words "devise" and "bequeath" correctly (*b*).

Confirmation of settlement.

If a settlement was executed on the testator's marriage, it should be noticed and confirmed in order to show that

(*b*) But "devise" seems to have been originally applicable to all testamentary dispositions; see Spelman Gloss. *s.v.*, Divisa; Co. Lit. 111 *a*; *Morgan* v. *Morgan*, 4 De G. & Sm. at 173; and is effectual to dispose of personalty, as, conversely, "bequeath" may dispose of realty; see *Whicker* v. *Hume*, 14 Beav. at p. 518; and per Jessel, M.R., *Freme* v. *Clement*, 18 Ch. D. at p. 509.

the provisions in the will for his wife and children are in addition to and not in substitution for those in the settlement. (4 Dav. Prec. 66; 2 K. & E. 683.)

Specific legacy (*c*).

A specific legacy is a gift of a definite thing or part of the testator's estate, which the testator has clearly distinguished and separated from the rest of his estate at the time of his death, and which is to be handed over in specie to the legatee; as "the watch that I usually wear," "my dog called Jack," "the sum of £10,000 Consols standing in my name on the day of the date of my will." A general legacy may or may not be part of the testator's property; thus, a legacy of £100, a diamond ring worth £500, are general legacies. The distinction between them is of importance; for, on the one hand, a specific legacy fails if the subject of it does not belong to the testator at the time of his death; on the other hand, it does not abate with the general legacies on a deficiency of assets. A general legacy must be purchased by the executors if necessary; but on a deficiency of assets is liable to fail and must be exhausted before the specific legacies are resorted to for payment of debts.

General legacy (*d*)

Demonstrative legacy (*d*).

A demonstrative legacy is a general legacy, charged on a particular fund; as a gift of so much money, "to be raised by the sale of my stock." It is a general legacy, inasmuch as the legatee is entitled to have it raised even if the fund out of which it is to be raised should fail; on the other hand, it is so far specific that it is not liable to abate with general legacies on a deficiency of assets, if the particular fund exists out of which it is directed to be paid.

Household goods.

Where the testator is married, it is convenient for him to bequeath his household stores and goods, furniture, books, plate, &c., to his wife; or, if he be unmarried, but keeps house with other members of his family, to them. Almost every conceivable form of words has been used for this purpose, and the decisions on the meaning of the words employed are numerous. Where brevity is an object, the

(*c*) M. L. P. P. 371. (*d*) M. L. P. P. 372.

better course appears to be not to attempt to enumerate the various classes of objects, but to give "all the effects in or about or belonging to or appropriated for" the house "at the time of my death, other than money or securities for money and deeds and documents of title."

Consumable stores.

If the testator is likely to have a considerable stock of wine, or of other consumable articles, they may form the subject of a separate gift. Such articles cannot be given for successive interests; a specific gift of them to A. for life and after his death to B. vests them absolutely in A. There is, however, an exception to this rule in the case of stock in trade given as part of a business; *Cockayne* v. *Harrison*, L. R. 13 Eq. 432; see *Breton* v. *Mockett*, 9 Ch. D. 95.

Settled furniture.

Sometimes the furniture, &c., in a house is bequeathed to the testator's widow for life, and is directed either to be divided among the children, or to go to some particular child at her death (see forms in 2 K. & E. 687). In this case the questions occur—*first*, whether an inventory is to be taken or not; and, *second*, whether the tenant for life is to keep the furniture in repair.

Inventory.

In the absence of any directions on the subject, it appears to be the duty of the executors to require an inventory to be made (*Slanning* v. *Style*, 3 P. W. 334; *Leeke* v. *Bennett*, 1 Atk. 470; *Bill* v. *Kinaston*, 2 Atk. 81), as otherwise there is a risk of some confusion occurring, at the death of the tenant for life, between the settled chattels and his own property. If, owing to the property being small, or for any other reason, the testator considers it unnecessary to require an inventory, the will should state so explicitly.

Insurance.

Generally, directions should be given for insurance by the tenant for life, and possibly for repairs; but when this is the case, the executors should be expressly exonerated from seeing that the insurances are kept up and the repairs made. It is convenient, where power is given to let a house and settled furniture, which on the death of the tenant for life may go to different persons, to give power to let the house and furniture together at a gross rent (*ante*, p. 269),

with power to the trustees, if necessary, to apportion the rent as between the owners of the house and the furniture.

Business.

Where the testator is in trade, it will be proper to give special directions as to his business. It must be remembered, *first*, that executors who carry on the testator's business, without express authority given by the will, commit a breach of trust (*e*); and therefore, if it is intended that they should do so, express power must be given to them; and, *secondly*, that executors who carry on the testator's business, either with or without such authority, cannot escape personal liability towards the persons with whom they deal (*f*). It is generally desirable, when the testator's business is bequeathed to any person for his own benefit, to make him the executor so far as regards the business: or, if there be any doubt as to whether the residue of the testator's property will suffice to satisfy his debts other than business debts, to appoint the legatee executor jointly with the general executors for the purposes of the business only. As one executor alone can give receipts for debts due to the testator, the legatee of the business can practically act (if the second plan be adopted), without any interference from the general executors; and, on the other hand, they can interfere if, owing to the deficiency of the testator's general assets, it becomes necessary to do so. If it is intended to settle the testator's business, this must be done by bequeathing it to trustees in trust to carry it on. It is hardly necessary to point out the great difficulty of finding trustees willing to undertake such an onerous trust, unless they are beneficially interested.

Special executor.

Partnership.

Where the testator is in partnership, it is proper to

(*e*) *Kirkman* v. *Booth*, 11 Beav. 273. But where there is a trust for sale with the usual power to postpone a sale, executors may be justified in carrying on the business; *Re Chancellor*, 26 Ch. D. 42.

(*f*) *Lucas* v. *Williams* (No. 1), 4 De G. F. & J. 436, and *Lucas* v. *Williams* (No. 2), 4 De G. F. & J. 439. Executors properly carrying on the testator's business are entitled to a general indemnity out of his estate, and may under the circumstances of the case be entitled to an indemnity even in priority to claims by creditors. *Dowse* v. *Gorton* (1891), A. C. 190

authorise the executors to make arrangements with the continuing partners as to the method of winding up the business, or as to leaving the testator's share in the business; or, if the partnership articles authorise the testator to nominate a successor, and he desires to nominate trustees to succeed him, he should give them full power to act (within the limits provided by the articles of partnership) for the benefit of his estate.

Sometimes the testator's business or share in a partnership is bequeathed charged with an annuity or other provision for his widow.

Annuity.

An "annuity" is a "legacy" (*Heath* v. *Weston*, 3 De G. M. & G. 601), so that a direction to pay "legacies" out of any particular fund charges the annuities on that fund also, unless the contrary intention appears (*Cunningham* v. *Foot*, 3 App. Cas. 974, 989) (*g*).

Where the testator wishes to make the bequest of an annuity, he should provide from what fund it is to be payable, and whether it is to be charged on the corpus or on the income only. If the annuity be charged on land, it may be limited as a rent-charge, thus charging it on the corpus of the property. If the annuity is to be secured on personalty, either of the following methods may be adopted: the annuity may be charged on the income of the whole residuary estate, with power to the trustees (see form in 2 K. & E. 724), if part of the residuary estate is wanted for division, to appropriate such part as they may think fit to answer the annuity; or the trustees may be directed to purchase at once a sufficient sum of Consols to meet the annuity out of the dividends, with power to apply the income of any part of the residuary estate to answer the annuity till appropriation. If the annuity be large compared with the probable income of the residuary estate,

(*g*) An annuity is *primâ facie* payable out of income; *Fearns* v. *Young*, 9 Ves. 553; *Re Owthwaite* (1891), 3 Ch. 497; *Hicks* v. *Ross* (1891), 3 Ch. 499. As to giving an annuity "free of income tax," see *ante*, p. 376.

it may be advisable to charge it on the corpus; and, at all events, it should be charged on the corpus of any special fund set aside to meet it. It will be remarked that, when the annuity is payable out of the whole or an appropriated part of the residuary estate, it necessarily defers the final distribution till the death of the annuitant; it is therefore sometimes convenient to authorise the trustees to purchase an annuity either from Government or an insurance office on the life of the annuitant, either in the name of the trustees or the annuitant. Where instead of the trustees being *authorised* they are *directed* to purchase an annuity, the annuitant is entitled to receive the value of the annuity (*Stokes* v. *Cheek*, 28 Beav. 620), unless the purchase is directed to be made in the names of the trustees and there is a gift over (*Power* v. *Hayne*, L. R. 8 Eq. 262), or a proviso for cesser (*Hatton* v. *May*, 3 Ch. D. 148) on alienation; but if the purchase is directed to be made in the name of the annuitant, the latter provision will be rejected as repugnant. (*Hunt-Foulston* v. *Furber*, 3 Ch. D. 285.) See *Re Mabbett* (1891), 1 Ch. 707.

The time at which the annuity is to begin, and the date of the first payment, should be mentioned. In the absence of any special directions, the annuity is held to commence from the testator's death; but the first payment, even if the annuity be directed to be paid quarterly, will not, in the absence of a direction to the contrary, be actually payable till the expiration of a year from the testator's death, at which time the whole of the payments accruing during the first year will have to be made. (See 4 Dav. Prec. 105 n.)

Generally speaking, a gift of an annuity is construed to mean an annuity for the life of the legatee (*Yates* v. *Maddan*, 3 Mac. & G. 532; *Blight* v. *Hartnoll*, 19 Ch. D. 294; *Re Morgan* (1893), 3 Ch. 222), but as the rule is subject to numerous exceptions (Hawk. Wills, 125), it is better to state so distinctly.

Spendthrift.

Provision may be made for a spendthrift by giving a discretionary power to the trustees of the will to raise out

of the income of the residuary estate an annuity and to pay it to the spendthrift; or, if anything should happen which would prevent him from enjoying it, to apply it for the benefit of him, his wife, and children, or any of them. (2 K. & E. 722.) If the spendthrift is unmarried, it would be advisable to add other persons as objects of the discretionary trust (*ante*, p. 340).

Conditions.

It is of the utmost importance that the student should learn the rules as to the vesting of legacies.

But first, it is necessary to consider the meaning of a condition, and the difference between conditions precedent and conditions subsequent. Where there are two events, A and B (and A is of such a nature that it may or may not happen), and event B is to happen only if event A happens, A is called a condition (*h*). A condition precedent is one which must happen before the interest can vest; *e.g.*, a gift of £100 to A. if he comes to London: here the condition of coming to London must be performed by A. in order to entitle him to the £100; and on its performance he becomes entitled to the gift. A condition subsequent is one which defeats or divests an interest already in existence; thus, suppose I give an annuity to A., and declare that it shall cease if he comes to London; here, if he performs the condition, *i.e.*, if he comes to London, the annuity ceases. A good example of a condition subsequent is afforded by the proviso for re-entry in a lease: where, if the condition is performed by the tenant committing a breach of covenant, his estate is divested on the re-entry of the landlord.

A condition may be subsequent as to one interest and precedent as to another. Thus an annuity may be payable to A. B. for life, subject to the condition that if he does some particular thing (changes his religion, for instance) it shall be payable during the rest of his life to C. D. Here the condition is subsequent to, or divests, A. B.'s interest; it is precedent to, or must happen before, C. D.'s interest vests.

(*h*) See M. L. R. P. 187.

Vesting (*i*). Where a gift, of either realty or personalty, is subject to a condition precedent, it is said to be "contingent"; where it is not so subject, it is said to be "vested"; and where it is subject to a condition subsequent, it is said to be "vested subject to be divested," or to be "defeasible." For example, if a legacy is given to A., or is given to trustees in trust for A. for life, with remainder in trust for B., the interests of A. and B. are vested; for neither of them is subject to a condition precedent. On the other hand, a legacy given to A. "if he attains twenty-one," is subject to a condition precedent, and is therefore contingent.

There is another manner of regarding the difference between vested and contingent legacies. Where the legacy is vested, the legatee is the owner of the legacy, even though (as where it is in remainder) the enjoyment of it is postponed. On the other hand, where the legacy is contingent, the legatee is not the owner of the legacy, though he will become the owner of it if the condition is performed.

A legacy is *primâ facie* contingent when it is given to A. "if he attains a certain age or marries" (*j*), or "upon attaining" (*k*), or "when" or "as" he shall attain, or "from and after" his attaining a certain age (*l*). The rule is the same if the gift is to a class.

Where payment deferred. It should be observed that the question whether a legacy is vested or contingent has nothing to do with the question at what time it is to be paid. For example, a legacy to A. "to be paid when he attains twenty-one," or "to be paid on his father's death," is vested.

It should also be noted that a direction postponing the time of payment does not postpone the vesting (*m*), except where the payment is postponed till the marriage of the

(*i*) As to the meaning of "vested" or "contingent" remainders, see M. L. R. P. 240.

(*j*) *Stapleton* v. *Cheales*, Prec. Ch. 317.

(*k*) *Leake* v. *Robinson*, 2 Mer. 363.

(*l*) *Hanson* v. *Graham*, 6 Ves. 239; *Leake* v. *Robinson*, 2 Mer. 363; *Davies* v. *Fisher*, 5 Beav. 201.

(*m*) *Lister* v. *Bradley*, 1 Ha. 12; *Williams* v. *Clarke*, 4 De G. & S. 472.

legatee, *Atkins* v. *Hiccocks*, 1 Atk. 500. The rules as to vesting of a legacy charged on land will be found *ante*, p. 376.

A gift of the rents and profits of land is equivalent to a devise of the land itself (*n*); and a gift of the income of personalty (*o*), unrestricted as to time, passes the corpus. It follows that if there is a contingent gift of the corpus and a gift to the same person of the whole interim rents and profits or income, or a direction that the whole interim rents and profits or income shall be applied for the benefit of the person to whom the corpus is given, that person takes a vested interest in the corpus, because, if the condition is never fulfilled, so that the contingent gift of the corpus does not take effect, the gift of the income is for ever and passes the corpus (*p*). A mere power to apply the whole or part of the income does not vest the corpus (*q*).

Provision is often made for a testator's widow or unmarried daughters by way of an annuity determinable on marriage, or in the case of the daughters on their marrying under a certain age without their guardian's consent. It is necessary, therefore, to consider the doctrine of conditions in restraint of marriage, that is, provisions or qualifications attached to a devise or bequest, to the effect that the marriage of the devisee or legatee shall defeat the devise or bequest. There is an important difference with respect to conditions in restraint of marriage according as the subject-matter of the gift is realty or personalty. As to realty the rules of Common Law apply; but the rules as to personalty are founded on the doctrines of the civil law.

Condition in restraint of marriage.

Where the subject-matter of the gift is land or a charge on land, the rules as to conditions in restraint of marriage generally are the following:—*First*, a limitation or gift

General condition, as to land.

(*n*) Hawk. Wills, 120; *Mannox* v. *Greener*, L. R. 14 Eq. 456; Jarm. Wills, 740.

(*o*) Wms. Exors. 1058; Hawk. Wills, 123.

(*p*) *Stapleton* v. *Cheales*, Prec. Ch. 317; *Hanson* v. *Graham*, 6 Ves. 239; Hawk. Wills, 227.

(*q*) *Re Wintle* (1896), 2 Ch. 711, where the cases are collected.

*until* marriage is valid and is determined by the marriage (*r*); *second*, a condition, whether precedent or subsequent, in general restraint of marriage, is void as opposed to public policy (consider *Perrin* v. *Lyon*, 9 East 170; *Jones* v. *Jones*, 1 Q. B. D. 279); but this rule is subject to the exception that a condition restraining a widow (*Newton* v. *Marsden*, 2 J. & H. 356), or widower (*Allen* v. *Jackson*, 1 Ch. D. 399), from marrying again is valid; *third*, where the gift is subject to a condition precedent of marriage with consent, the condition must be performed to entitle the devisee to the estate (*s*); *fourth*, where an estate is subject to be divested by a condition subsequent in the event of marriage without consent, a breach of the condition will divest the estate unless the condition becomes impossible to be performed, as where the person whose consent is required is dead at the time of marriage (*t*).

General condition, where the subject-matter of the gift is personalty.

In cases where the rules of the civil law apply, *i.e.*, in cases where the gift is of personal property, and where it consists of a mixed fund of personalty and the proceeds of sale of realty (*Bellairs* v. *Bellairs*, L. R. 18 Eq. 510), the rules are the following:—*First*, a gift until marriage is valid and is determined by the marriage (*u*); *second*, a condition, whether precedent or subsequent, in general restraint of marriage is void (*x*), subject to the exception that such a condition annexed to a gift to a widow or widower, if there is a gift over on marriage, is good; *third*, a condition precedent requiring marriage with consent (*y*), and *fourth*, a condition subsequent directed against marriage without consent, are considered to be *in terrorem* only, and have no effect; *fifth*, the third and fourth rules are subject to the

(*r*) *Morley* v. *Rennoldson*, 2 Ha. 580; *Webb* v. *Grace*, 2 Ph. 702; *Heath* v. *Lewis*, 3 De G. M. & G. 956.

(*s*) See notes to *Scott* v. *Tyler*, 1 W. & T. L. C., at p. 556.

(*t*) *Ib.* at p. 558.

(*u*) *Potter* v. *Richards*, 24 L. J. Ch. 488; *Heath* v. *Lewis*, 3 De G. M. & G. 954.

(*x*) *Morley* v. *Rennoldson*, 2 Ha. 570.

(*y*) *Reynish* v. *Martin*, 3 Atk. 330; but see notes to *Scott* v. *Tyler*, 1 W. & T. L. C., at p. 556.

exception following, in each of which cases the condition, whether precedent or subsequent, is effectual: ($\alpha$), if there be a gift over on marriage without consent ($z$); ($\beta$), where the marriage with consent is one of several alternative conditions, as where the bequest is subject to the condition precedent of attaining a particular age unmarried, or marrying under that age with consent; ($\gamma$), where the condition is directed against marriage under a certain reasonable age without consent ($a$); ($\delta$), where the legatee takes another legacy on breach of the condition. (*Gillet* v. *Wray*, 1 P. Wms. 284; *Re Nourse* (1899), 1 Ch. 63.)

Particular condition in restraint of marriage.

A condition imposing a particular restraint on marriage is valid, whether annexed to a gift of realty or to a gift of personalty: *e.g.*, a condition in restraint of marriage with a named person or with persons of a particular class, as a Scotchman (*Perrin* v. *Lyon*, 9 East 170), or a domestic servant (*Jenner* v. *Turner*, 16 Ch. D. 188); or of a particular religion, as a Papist (*Duggan* v. *Kelly*, 10 Ir. Eq. Rep. 295), or a Christian (*Hodgson* v. *Halford*, 11 Ch. D. 959).

Condition restraining marriage under twenty-one.

It should be remembered that, if a legacy be given to a daughter contingently on her attaining twenty-one or marrying with consent, it will vest on her attaining twenty-one even though she may have previously married without consent. If, therefore, it is really intended to prevent a daughter from marrying under twenty-one without consent, the legacy should be made contingent on her marrying in the testator's lifetime, or on her attaining twenty-one without having previously married, or on her marrying after the testator's death under the age of twenty-one with consent. It is unnecessary to annex the condition of the testator's consent to a marriage during his lifetime, for on her marriage without his consent he can revoke the legacy.

Gifts for "superstitious uses."

The following scheme is, it is believed, often adopted in making gifts for the purposes of the religion of one of the

(z) Theob. Wills, p. 500; notes to *Scott* v. *Tyler*, 1 W. & T. L. C. at p. 560.

(a) *Stackpole* v. *Beaumont*, 3 Ves. 89.

principal denominations in this country, where such gifts might be void as being for superstitious uses. The testator devises or bequeaths the property to two or three of the clergy of that denomination, selecting respectable people whom he does not know personally, and he carefully abstains from communicating his intentions to them in his lifetime, but he leaves with his will a letter addressed to them stating how he wishes the property to be disposed of, and also a letter addressed to their ecclesiastical superior informing him of the transaction. It is thus impossible on the one hand for them to suppress the testator's wishes and retain the gift for their own use without their conduct becoming known to the superior, and on the other hand for any one to establish that a trust is created which might be invalid as offending against the law.

Letter left with will.

It is obvious that the device of giving a legacy imposing a moral but not a legal obligation on the legatee to apply it in some particular manner, may be used for various purposes. For instance, a provision can be made in this manner for an improvident child. In such cases it appears advisable not to state the real intention of the testator in the will, but to leave with the will a letter (not attested) addressed to the legatee and stating the wishes of the testator. The greatest care must be taken not to inform the legatee during the testator's lifetime of his real intentions; for, if the legatee be informed, a trust will be created contrary to the intentions of the parties; and that, even where the result would be to make the testator's intentions fail altogether. Thus, where land was given by will to a person who had previously been directed to hold it in trust for charity, at a time when a gift by will to the charity was invalid, the devisee was held to be a trustee of the land for the testator's heir-at-law (*b*).

Settled legacy.

It will sometimes be found convenient to give settled

(*b*) Now, by the effect of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), land may be given by will for any charitable purpose; but the Act requires it to be sold.

legacies to the trustees "upon the trusts, &c., hereinafter declared, &c.," and to state the trusts after the provisions as to the residue.

Gifts to class—vesting (*e*).

A group of persons denoted by a common description, as filling a common character or holding the same position, constitute a class (*d*). For example, "barristers," "soldiers," "A.'s children," "such of A.'s children as attain twenty-one," are classes. The rules as to the vesting of testamentary gifts to a class are the following:—

Immediate gift.

(i.) A devise or bequest to a class vests *primâ facie* in the members of the class in existence at the death of the testator, if there are any then in existence (*e*). For example, if A. makes a gift by will to "the children of" B., and any children of B. are living at A.'s death, they take the whole. If no child of B. is living at A.'s death, all the subsequently born children of B. take personalty (*f*), and probably realty (*g*) given to "the children of" B.

Gift to class in remainder.

(ii.) Where a devise or bequest is made in remainder to a class, *e.g.*, to A. for life, remainder to the children of A. (or to the children of B.), it vests in the members of the class living at the death of the testator, subject to letting in other members of the class who come into existence after the death of the testator and before the time of distribution (*h*), *i.e.*, the death of the tenant for life (assuming that he survives the testator), the principle being to ascertain the class at the period of distribution. It will be observed that in this case the members of the class living at the testator's death take vested interests, and that each member coming into existence subsequently before the period of

(*c*) See Hawk. Wills, ch. vii., pp. 68 *et seq.*; Theob. Wills, 255.

(*d*) Interp. 355. See per Ld. Selborne in *Pearks* v. *Moseley*, 5 App. Cas. at p. 723.

(*e*) Real estate, *Singleton* v. *Gilbert*, 1 Cox 68; personalty, *Viner* v. *Francis*, 2 Cox 190; *Hill* v. *Chapman*, 1 Ves. jun. 405; *Re Mervin* (1891), 3 Ch. 197 at p. 202.

(*f*) *Weld* v. *Bradbury*, 2 Vern. 705; *Harris* v. *Lloyd*, T. & R. 310.

(*g*) Fearne, C. R. 532.

(*h*) *Browne* v. *Hammond*, John. 210. See the cases collected in Jarm. Wills, 1011.

distribution takes a vested interest, subject in both cases to be divested as to part by other members of the class coming into existence and taking shares, and thus *pro tanto* diminishing the amount of shares previously vested. The shares being vested, if a member of the class dies before the period of distribution, his share passes to his heir, devisee, or personal representative, as the case may be. For example: Let the gift be of personalty in trust "for A. for life, and after his death for the children of B." In this case the children of B. living at the death of the testator take vested interests, and B.'s children subsequently born during A.'s life take vested interests at birth; and the fund ultimately becomes divisible among such of the children living at the death of the testator or born afterwards as survive A., and the personal representatives of such of them as die before A. (*i*).

(iii.) Where the vesting or payment is to take place when a specified event happens, no members of the class born after the event can take (*j*). Thus, if the gift is an immediate gift to such of the children of A. as attain twenty-one, the event is the attainment of twenty-one by the eldest child; and if any child of A. has attained twenty-one before the testator's death, only such children of A. as are living at the testator's death and have then attained or subsequently attain twenty-one can take (*Hagger* v. *Payne*, 23 Beav. 474); but if no child of A. has at the testator's death attained twenty-one, then all children of A. take who are in existence when the eldest child attains twenty-one, and who attain twenty-one. That is to say, the time of distribution and of fixing the class is the time when the first child becomes entitled to receive his share. This is

(*i*) This rule applies to the gift of an aggregate sum to a class; but where there are separate legacies (*e.g.*, £100 to *each* of the children), only children living at the testator's death are entitled; a rule which rests on the ground of the inconvenience of postponing distribution of the estate; *Mann* v. *Thompson*, Kay 638.

(*j*) This rule is applicable to a voluntary settlement, and probably to a settlement for value; *Re Knapp* (1895), 1 Ch. 91.

a rule adopted to avoid the inconvenience which would result if no share could be ascertained until it became certain that no more persons could possibly become members of the class, and so diminish the minimum share of each person already entitled. It is a "rule of convenience, not founded on any view of the testator's intention, that since, when a child wants its share, it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased. That rule of convenience, being opposed to the intention, is not to be applied when it is not necessary, it being also a rule that you let in all who are born up to the time when a share becomes payable (*Berkeley* v. *Swinburne*, 16 Sim. 275)"; per Jessel, M.R., *Re Emmet*, 13 Ch. D. 484, 490. See *Gillman* v. *Daunt*, 3 K. & J. 48; *Re Mervin* (1891), 3 Ch. 197 (*k*).

If the gift is in remainder, *e.g.*, to A. for life, and then to such children of B. as attain twenty-one (or to the children of B. payable at twenty-one), the period of distribution will be the death of A. if any child has then attained twenty-one, otherwise it will be when the first child attains twenty-one; and all children born before such period will take interests, vested or contingent (*Re Emmet*, 13 Ch. D. 484).

Devises—Land Transfer Act, 1897.

A devise contained in the will of a testator dying before 1898 takes effect immediately on his death; but, under the Land Transfer Act, 1897 (*l*), where a man dies (testate or intestate) after 1897, all the real estate vested in him without a right in any other person to take by survivorship (excepting copyholds or certain customary freeholds, but including property over which he has exercised a general testamentary power), vests on his death, notwithstanding

(*k*) The rule does not apply to gifts of income; *Re Weemouth*, 37 Ch. D. 266. Nor to real estate given specifically and without a trust for conversion; *Blackman* v. *Fysh* (1892), 3 Ch. 209.

(*l*) L. T. A. 1897 (60 & 61 Vict. c. 65), s. 1.

any testamentary disposition, in his personal representatives or representative as if it were a chattel real. The personal representatives have (*m*) to administer the real estate as if it were personalty, and they can therefore sell or mortgage it; but some or one of several personal representatives cannot convey or transfer land without the authority of the Court. (*Re Pawley and London and Provincial Bank, Ltd.*, (1899) W. N. 214.)

It need hardly be said that an estate for the life of the testator, or land of which he dies seised for an estate tail, does not pass under sect. 1. The word "vested," in sect. 1 of the L. T. A. 1897, is used in its original meaning of "being the property of" (*n*), and not in contradistinction to "contingent." It follows that the estate of the deceased in realty (excepting as above mentioned), whether in possession, remainder, or reversion, and whether legal or equitable, vested or contingent, vests on his death in his personal representative. The provisions above referred to of the L. T. A., 1897, are not applicable to trust or mortgage estates, which devolve under the C. A. 1881, s. 30.

The personal representatives may assent to a devise or convey the real estate to any person entitled to it (*o*), and either subject to a charge for any money which they are liable to pay, or without such charge; and on such assent or conveyance, subject to a charge for all moneys which they are liable to pay, all their liabilities in respect of the real estate will cease, except as to acts done or contracts entered into by them before the assent or conveyance. After the expiration of one year from the death of a land owner the person entitled to the land can obtain an order of the Court requiring the personal representative to convey it to him.

The provisions above cited of the Land Transfer Act, 1897, do not affect the beneficial interests in land, whether devolving under a will or an intestacy, except that they

(*m*) L. T. A. 1897, s. 2.
(*n*) See M. L. R. P. 240.
(*o*) L. T. A. 1897, s. 3. For form of assent, see form 46 in Schedule to L. T. R., and for form of conveyance, 1 K. & E. 909.

enable the personal representative, without any order of the Court, to sell or mortgage the land for the purposes of administering the estate of the testator; and they do not appear to necessitate any change in the forms used for beneficial gifts.

Real estate.

The owner of land may adopt either of three different schemes of disposition. He may give it absolutely to the devisee; he may put it into strict settlement; or he may settle it on trusts resembling those of a settlement of personalty.

Devise in fee.

In the *first* case, there are various plans for vesting the legal estate in fee simple in the devisee. The testator may make (α) a devise "to A. B. and his heirs"; (β), a devise "to C. B. and his heirs to the use of (or in trust for) A. B. and his heirs"; (γ), a devise "to the use of A. B. and his heirs"; and in either case the words of limitation may, since the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26, s. 28), though they should not, be omitted, or the words "in fee simple" may be substituted. If it is really intended that A. B. should take an equitable estate only, the devise may be "unto and to the use of C. B. and his heirs, in trust for A. B. and his heirs," or, "to the use of C. B. and his heirs in trust for A. B. and his heirs." The best plan in either case is to devise directly "to the use of" the person intended to take the legal estate.

Legal estate.

The rule that a devise "to C. B. and his heirs to the use of (or in trust for) A. B. and his heirs," vests the legal estate in A. B., is subject to the exception that the legal estate is vested in C. B. if any trust or duty is imposed on him the performance of which requires that the legal estate should be vested in him (*p*).

Devise in strict settlement.

A devise in strict settlement follows very closely the form

(*p*) See this explained, M. L. R. P. 412, where it is pointed out that though the Statute of Uses does not apply to wills, yet it is sometimes used as a mode of construing wills where the form of the gift appears to have been framed with reference to the statute, and was intended to operate as if the statute applied to it.

of similar limitations in a marriage settlement, with the following exceptions: ($\alpha$), as it is unnecessary to raise a seisin on which the uses are declared, the devise may be made directly to the uses; ($\beta$), the usual form of a gift in tail is "to the use of A. B. in tail," instead of "to the use of A. B. and the heirs of his body"; ($\gamma$), the successive limitations are generally introduced by the words "with remainder"; ($\delta$), as the will speaks from the death of the testator, and therefore time has to be calculated from that moment with respect to the rules against perpetuities, a proviso may be inserted cutting down the estate tail given to any person born in the testator's lifetime to an estate for life, with remainder to his children successively in tail (see form in 2 K. & E. 794); or this may be done by direct limitation.

Terms to raise money for debts.

In cases where a devise is made in strict settlement, and any doubt exists as to whether the testator's personal estate will be sufficient to satisfy his funeral and testamentary expenses, debts, and legacies, it is a convenient course to limit a term, preceding the first estate for life in the realty, to the use of trustees in trust to raise such sum of money in aid of the personal estate as may be required for such purposes. It should be declared that no person advancing money on the security of the term shall be bound to inquire as to the deficiency of the personal estate; and that the statement in writing of the trustees that no more will be required for the purposes of the term shall be conclusive. (See 2 K. & E. 804.) Possibly the provisions of the L. T. A. 1897, s. 2, may render this provision unnecessary.

Executory and executed trusts.

Sometimes a testator directs land to be purchased, and to be settled for the benefit of certain persons, or a certain class of persons. The question then arises whether he has left it to the trustees to discover from his general expressions what uses and trusts are to be inserted in the settlement, or has definitely stated such uses and trusts. Has he been, as it is sometimes called, his own conveyancer? To use technical language, are the trusts

*executory* or *executed?* (*q*) Generally speaking, it is more convenient to frame the will so that the trusts are executed; but occasionally, when it has to be prepared in a hurry, this cannot be done; and then the order of the limitations should be stated with at least the same degree of accuracy as in carefully framed instructions for a will. Any powers for the benefit of any particular person or class of persons, such as powers to jointure or to raise portions, must be mentioned, and the amounts chargeable specified. It will seldom be necessary to mention powers of leasing and sale, &c., as they may in ordinary cases be omitted in reliance on the S. L. Acts; but any provisions extending or supplementing these powers, such as the clauses as to the mansion house, or as to notices, *ante*, p. 416 *et seq.*, must be expressed.

Land to be divided.

Where land is to be settled by will upon trusts resembling those of a settlement of personalty, it should be devised to trustees upon trust for sale, and the trusts should be declared of the proceeds. This plan should always be adopted where the scheme of the will is for the division of any particular land between the testator's children (*ante*, p. 311).

Land in foreign country.

The practitioner must not attempt to make a devise of land situated in a country where the law is different from the law of England: for the questions whether such land can pass by a will, and if so what must be the manner of executing the will, and what construction will be put on any technical words employed in the will, are regulated by the law of the country where the land is situated. If, therefore, the testator has such land, the proper course is for him to dispose of it by a separate instrument in conformity with the law of the place where it is situated. If he is *in extremis* and it is absolutely necessary for him to make a will of land out of England, he should sign a dated holograph instrument, *i.e.*, one entirely written by him, or a

(*q*) See the notes to *Lord Glenorchy* v. *Bosville*, 2 W. & T. L. C.; 3 Dav. Prec. 329, note; *Thompson* v. *Fisher*, L. R. 10 Eq. 207; *Stanley* v. *Coulthurst*, L. R. 10 Eq. 259, and the cases cited in the authorities referred to.

mystic testament (*qq*) (either of which will be valid in most countries where the law is founded on the Civil Law), in the presence of three witnesses, all signing in the presence of the testator and each other, so as to render it valid in any place where the old or existing English law is in force, affecting the foreign land only, giving it in trust for sale and directing the payment of the proceeds to the trustees of the general will. The principal will should contain a clause putting all persons to their election to confirm the foreign will. (2 K. & E. 857.) See this subject discussed in 2 Jarm. Wills, 1668.

Residue (*r*).

A gift of residue (whether the word "residue" be used or not) is construed so as to pass all the testator's property not otherwise effectually disposed of. It follows that lapsed and void legacies pass under the residuary bequest; and (in wills made since the passing of the Wills Act, 1837) lapsed and void devises pass by the residuary devise. The result is that, even where a testator believes that the gifts in his will have so far exhausted his estate as to leave but little to fall in the residue, it may happen, owing to the death of some of the objects of his bounty, or owing to his saving money, that the residuary gift may eventually become of importance; and for this reason it requires some consideration to whom the gift of residue should be made. In the ordinary case where the executors are the persons to whom the testator leaves the bulk of his property, it is convenient to make them the residuary legatees; for this may save trouble in making up the accounts of the testator's estate.

Lapse.

The general rule is that, if any devisee or legatee dies in the lifetime of the testator, the gift to him lapses and falls into the residue. This rule is subject to the following exceptions:

Devise in tail.

*First.* Where any person to whom any real estate is devised for an estate tail, or an estate in quasi entail (*rr*),

(*qq*) As to a mystic testament of French law, see Code Civil, s. 976 *et seq.*

(*r*) See as to the income of residue, 37 Sol. J. 263, 281.

(*rr*) *I.e.*, an entail in an estate *pur autre vie.*

dies in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue is living at the death of the testator, the devise does not lapse, but takes effect as if the death of such person happened immediately after the death of the testator, unless a contrary intention appears by the will (Wills Act, 1837, 7 Will. 4 & 1 Vict. c. 26, s. 32).

Gift to testator's issue.

*Second.* A gift to one of the testator's issue is sometimes prevented from lapsing by the Wills Act, 1837, s. 33, which enacts, that "Where any person being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

The effect of this section is not to substitute the issue of the deceased legatee or devisee for him, but to render the property left to him *his own* property (*s*), so that it passes by his will, or, if he die intestate as to it, goes to his heir or administrator, as the case may be, being in either case liable to his debts in due course of administration. Where a father made a devise to his son who died in his lifetime leaving issue and having devised all his property to the father, it was decided that the will of the son was to be construed as if he had survived the father, *i.e.*, the latter did not take. (*Re Hensler*, 19 Ch. D. 612.)

But the Act does not apply where the gift is to a class, as to "such of my children as attain twenty-one," and a member of the class dies in the testator's lifetime; for in that case there is no lapse, as no child dying before the testator is included in the class. Thus, suppose a testator

(*s*) *Johnson* v. *Johnson*, 3 Ha. 157; *Eager* v. *Furnivall*, 17 Ch. D. 115; *Perry's Executors* v. *Reg.* L. R. 4 Ex. 27.

having a son John and other children bequeaths £10,000 to John and £20,000 to be divided between his, the testator's, children. John dies in the testator's lifetime, leaving issue, and some of his issue survive the testator. The legacy of £10,000, which would have lapsed had John not come under the saving contained in the section, passes to John's executor, or administrator, as the case may be. As to the £20,000 there is no lapse, for the will speaks from the testator's death, when John is not one of his children, so that no part of it is given to John, or passes by his will.

If therefore, where the gift is to the testator's children as a class, it is intended to prevent lapse in the case of any child predeceasing the testator, the definition of the class should be extended so as to include the children who die before the testator leaving issue who survive him. But, although this will be sufficient in the case of the testator's children, it would not suffice in the case of a gift to the children of another person, not being the testator's issue; for the section of the Wills Act, 1837, now under consideration would not apply, and it would therefore be impossible to give anything to a child dying before the testator (*t*). It will therefore be necessary, in this case, to add a few words giving it to the personal representatives of the child dying before the testator, as part of his personal estate (*u*). (See form in 2 K. & E. 750.)

Gift under power.

It should be observed that although, where the parent's will exercises a general power to appoint by will, the 33rd section of the Wills Act, 1837, applies (*Eccles* v. *Cheyne*, 2 K. & J. 676), it does not apply where the will exercises a limited power to appoint to children (*Griffiths* v. *Gale*, 12

(*t*) *Re Coleman & Jarrom*, 4 Ch. D. 165.

(*u*) See *Trethewy* v. *Helyar*, 4 Ch. D. 53, for an instance of a gift to the "executors of A." The effect is that the property so given is to be disposed of as if it were given in trust for the persons entitled to the estate of A., whether as creditors or beneficiaries; but it does not form part of A.'s estate within the meaning of the Acts imposing probate and legacy duties. *Lord Advocate* v. *Bogie* (1894), A. C. 83: and see *A.-G.* v. *Lloyd*, (1895) 1 Q. B. 496.

Sim. 354; *Freeland* v. *Pearson*, L. R. 3 Eq. 663); for if it applied, it would in effect enable the parent to appoint to persons not objects of the power, namely the beneficiaries under the child's will.

Share of residue.

*Third.* Where the subject of the gift which lapses is a share of residue it does not fall into residue, but remains undisposed of. This peculiarity of a lapsed share of residue not falling into residue may be exemplified by the case where the "residue" of residue is given. Thus, to take the case supposed by Mr. Hawkins (Hawk. Wills, p. 43): "If the testator gives £10,000 *out of the residue* of his personal estate to A., and the *residue* to B., and the bequest to A. fails, the gift to B. will not in general carry the £10,000 bequeathed to A., which will consequently be undisposed of." This is not generally intended, and some words should be introduced to restore it to the residue, properly so called, on A.'s death in the testator's lifetime. But if a testator directs that any lapsed share of residue shall fall into residue, there is no intestacy as to that share; it goes to the other residuary legatees. (See *Re Palmer* (1893), 3 Ch. 369, overruling *Humble* v. *Shore*, 7 Ha. 247.)

Provisions for testator's family.

The wishes of testators and the circumstances of their families vary so much that it is extremely difficult to lay down any rule as to what is the usual method of making a provision for a testator's wife and family. Perhaps in cases where the property is of a moderate amount and the children are young, the best plan is to bequeath the residue to trustees upon trust to convert it and invest the proceeds, and to pay the income to the testator's widow for life, and after her death to divide the capital among such of the testator's issue as she shall appoint; and in default of appointment, upon trust for such of the testator's children as, being sons, attain twenty-one, or being daughters attain twenty-one, or marry under that age.

Precatory trust.

Occasionally the testator, in giving a life interest to his widow, expresses a wish that she will provide for or educate the children; but as a general rule he wishes to impose only a moral, not a legal obligation on her. The Courts, how-

ever, sometimes construe the expression of the testator's wishes as imperative, and as creating a trust, which is called a precatory trust; but the tendency at the present time is against such a construction (*x*). (See Hawk. Wills, 159). It is of importance, therefore, to ascertain whether the testator really means to make the provision for his widow subject to a binding trust in favour of the children, or whether, as is usually the case, he does not wish to do so. In the latter case, care should be taken to add a few words showing that no legal obligation is intended to be imposed on the widow. (See form in 2 K. & E. 744.) If it is intended to make her life interest subject to a trust for the maintenance of the children, it should be framed on the plan mentioned *ante*, p. 341.

Analysis of clauses providing for widow and young children.

The following is an analysis of the residuary provisions in favour of the testator's widow and children. (See the form in Stud. Prec. 122):

1. General devise and bequest to trustees upon trusts for conversion.

2. Direction to pay funeral and testamentary expenses, debts, and legacies, and the duties on any legacies or annuities bequeathed free of duty, out of proceeds, and to invest the residue, with power to vary securities.

3. Direction to pay income to wife during life.

4. After her death to stand possessed of the trust fund upon trust for such of the testator's issue as she shall appoint.

5. Trust in default of appointment for such of the testator's children as being sons attain twenty-one, or being daughters attain that age or marry.

6. Hotchpot, advancement, and (unless omitted in reliance on the C. A. 1881, s. 43) maintenance and accumulation clauses.

7. Trusts in default of any child attaining a vested interest.

8. Power to postpone sale and conversion (unless this

(*x*) *Re Adams and Kensington Vestry*, 27 Ch. D. 394; *Re Diggles*, 39 Ch. D. 253; *Re Hamilton* (1895), 2 Ch. 370; *Re Williams* (1897), 2 Ch. 12; *Clancarty* v. *Clancarty*, 31 L. R. (Ir.) 530.

power is incorporated with the trust for conversion, 2 K. & E. 736); and directions as to intermediate income.

9. Appointment of guardians (*y*).

Frame of gift of residue and trust for conversion.

There are two different modes of framing the gift of residue to the trustees and the trust for conversion. Sometimes the gift of realty is separated from that of personalty, and each gift followed by a trust for conversion; but the better plan is to make a mixed gift of the residuary real and personal estate, followed by the trust for conversion. Where copyholds are to be converted, it is convenient to give the trustees a power of appointment over them; for, if this be done, and the trustees can sell before the lord can seize for want of a tenant (M. L. R. P., 329), the purchaser is entitled to be admitted without any admission of the trustees or of the testator's heir. The power of appointment should be followed by a declaration that it is given to the intent that the trustees shall sell the land. (See form in 2 K. & E., 728.)

Conversion.

It is the duty of the trustees, in the absence of directions to the contrary, to sell all personal property which by the will is given to be enjoyed by persons in succession, and to invest the proceeds. This rule will be applied both in favour of and against the tenant for life. Thus, if the property be leaseholds, they must be sold to the prejudice of the tenant for life; while, on the other hand, a reversionary interest producing no income must be sold and the proceeds invested, so as to produce an income for the tenant for life (*z*).

For these reasons it is important to authorise the trustees to postpone the conversion if they think fit (*Re Norrington*, 13 Ch. D. 654); to declare that the net income of the estate until conversion shall be applied as if it was the income of the proceeds of conversion; that no reversion or other property not actually producing income shall be treated as producing income for the purposes of the will; and that realty shall for the purposes of transmission be considered as converted from the testator's death. (See forms in 2 K. & E., 736).

(*y*) See *post*, p. 478; 2 K. & E. 827, note.

(*z*) See *Macdonald* v. *Irvine*, 8 Ch. D. 101; *Howe* v. *Earl of Dartmouth*, 7 Ves. 137; S. C. and notes thereto in 1 W. & T. L. C.

Failure of objects of conversion.

If, where the testator has directed land to be converted into money, or money to be invested in land, a partial intestacy occurs, the questions arise whether the heir-at-law or the next of kin take the property the trusts whereof have failed; and whether the person taking it takes it in the state in which it happens to be at the time when the failure occurs. Let us suppose, for example, that a testator having real property directs it to be sold, and the proceeds to be held upon trusts for his wife and children (similar to those mentioned at p. 466), but that he omits to declare any ultimate trust in case no child should attain a vested interest. If no child attains a vested interest, the question arises whether the land or its proceeds shall pass to the testator's heir-at-law, or to the persons who would become entitled to the property under the Statutes of Distribution had it been personalty. All the cases may be tabulated as below, where the figures have reference to the cases deciding each point:

| Nature of Property directed to be converted. | Into what it is to be converted. | To whom the Interest undisposed of goes. | Does he take it as *Personal* or *Real* Property. |
|---|---|---|---|
| Money. | Land. | Next of kin (1). | If failure total,(*a*) *personal*, if partial, *real* (2). |
| Land. | Money. | Heir (3). | If failure of trusts be total, *real* (4); if failure be partial, *personal* (5). |

(1) *Cogan* v. *Stephens*, 1 Beav. 482 (n.).

(*a*) A total failure occurs where no beneficial trusts are declared concerning the converted property, or if such trusts are declared and they all are incapable of taking effect. A partial failure occurs where the trusts declared do not exhaust all the converted property, or if the trusts exhaust all the interest, but some of them are incapable of taking effect.

(2) *Curteis* v. *Wormald*, 10 Ch D. 172.

(3) *Ackroyd* v. *Smithson*, 1 Br. C. C. 503; S. C. with notes, 1 W. & T. L. C., where the whole subject is discussed.

(4) *Smith* v. *Claxton*, 4 Madd. 484.

(5) *Jessopp* v. *Watson*, 1 Myl. &

Application of proceeds of conversion.

The trustees are directed, out of the proceeds of the sale and conversion and the testator's ready money at the time of his death, to pay the testator's funeral and testamentary expenses and debts and the legacies bequeathed by the will or any codicil thereto, and the duty on any legacies or annuities bequeathed free of duty, and to invest the *residue of the same moneys*. The student may possibly inquire whether *the residue of the same moneys* is not a "residue of residue." This is not the case, for the property originally given to the trustees is really residue plus the amount required for payment of funeral and testamentary expenses (*b*), debts, and legacies, and the true "residue" is not ascertained until they have been paid, or in other words is "the residue of the same moneys." See *Trethewy* v. *Helyar*, 4 Ch. D. 53. The trusts for investment, the power to vary securities, and the trusts for the wife and issue of the testator follow closely the forms in settlements of personalty (*ante*, chapter xi.).

Provisions for children during widow's lifetime.

In the scheme under consideration no provision is made for the children during the widow's lifetime. So long as she remains unmarried she may, in most cases, be safely trusted to provide for them; but there is the possibility that she may contract a second marriage. There are various plans of providing for the children after her second marriage. Her life interest may be made determinable on a second marriage; in which case it may be proper to give her an annuity, to commence on her re-marriage; or her life interest may be given subject to the obligation of maintaining and educating the children, *ante*, p. 341.

If the scheme under consideration be adopted, and a son marries under twenty-one, or a daughter marries under twenty-one without consent (in cases where consent is required), and either son or daughter dies under twenty-one

K. 665; and *Smith* v. *Claxton*, 4 Madd. 484. *Re Richerson* (1892), 1 Ch. 379.

(*b*) These include the costs of administering the estate; *Sharp* v. *Lush*, 10 Ch. D. 468, where the term "executorship expenses" was held to be equivalent.

leaving issue, such issue is unprovided for—a result which is probably intended, but which can be remedied if the widow thinks fit by an exercise of the power of appointment.

It is proper also to make some disposition of the residue in case no child or other issue attains a vested interest: for otherwise the residue will in that event be undisposed of, and will pass to the widow and children as on an intestacy, according to the Statutes of Distribution; and, in this case, as on the death of any child unmarried, its personal property passes to its mother and brothers and sisters (if any), or if there be no brother or sister to its mother only, the result will be that, if the widow survives all the children, she becomes entitled to the whole property.

If the widow's life interest is determinable on re-marriage, the power of appointment is sometimes made exercisable during widowhood only. If it is to remain exercisable after re-marriage, it may be desirable to provide that no appointment after re-marriage shall diminish the share to which any child has become entitled in possession in default of appointment (see *ante*, p. 352).

Instead of making the shares of the children to vest at twenty-one, or in the case of daughters at marriage, the following provisions are sometimes made:

Vesting postponed.

*First.* The vesting of the children's shares is postponed. It will be observed that, as every child of the testator is necessarily born or *en ventre sa mère* at the testator's death, there is no risk of offending against the rules as to perpetuities by suspending the vesting of the gifts of the testator's own property to his children; but that, on the other hand, if the testator exercises a special power of appointment in favour of children (either of himself or any other person), or if he gives his own property to the children of another person, and the vesting is postponed later than twenty-one, it is possible that the appointment or gift may fail as offending against the rule; and if it be to a class, it may fail as to the whole class, notwithstanding that

in the event, some or even all the members of the class attain the age, named by the testator for vesting, within the period allowed by the rules against perpetuities. It is therefore necessary to insert some words restricting the class of children so as not to infringe the rule. If, for instance, the gift is of the testator's own property to the children of another person and the vesting is to be postponed to the age of twenty-five, the class may be defined as the children of A. who attain twenty-five before the expiration of twenty-one years from the death of the survivor of A. and the testator, or survive the survivor of A. and the testator for twenty-one years. This provision would not be obnoxious to the rule, and the only children admitted, whom the testator did not intend to provide for unless they attained twenty-five, are those under four years of age at the death of the survivor of A. and himself (see the form in **2 K. & E. 748**) (*c*).

Substitution of issue.

*Secondly*. The issue or children of a child dying in the testator's lifetime, may be substituted for him. There are two modes of doing this: (1) the gift may be to a class consisting of the children and the issue of deceased children, in which case the issue are primary objects of the gift (2 K. & E. 751); or (2) there may be first a gift to the children and then the issue of deceased children may be substituted for such children by a separate clause (2 K. & E. 753). In either case, the will should direct that the issue shall take only the share which their parent would have taken had he survived the testator.

Substitution of family.

*Thirdly*. The husband (or wife) and children of a child dying in the testator's lifetime, may be substituted for such child. This can be conveniently effected by declaring that

(*c*) It should be remembered (see *ante*, p. 343) that a gift made under a special power will be void unless it would have been void if it had been inserted in the instrument creating the power. This rule does not apply to gifts under a general power, as such a power is equivalent to ownership. *Rous v. Jackson*, 29 Ch. D. 521: see this distinction between the effects of special and general powers discussed in Mr Butler's Note, Co. Lit. 272 *a*.

the trustees shall hold the share to which the child would have been entitled had it attained twenty-one and survived the testator, upon trusts for the husband or wife and children similar to the trusts in favour of the testator's widow and children (2 K. & E. 771).

Gift to child.

*Fourthly.* The share of any child dying before the testator leaving issue who survive the testator, may be given so as to pass as part of the estate of such child (*ante*, p. 464).

Exclusion of child.

*Fifthly.* Sometimes a child otherwise provided for is excluded. In this case a trust should be declared in his favour in default of the other children becoming entitled (see form in 2 K. & E. 754).

Inequality in shares.

*Sixthly.* Sometimes the shares of the children are made unequal (see 2 K. & E. 755). A rich testator may give a larger share to the eldest son; and this may be conveniently effected by a proviso that the property is to be divided equally among the children, but declaring that the share of no younger child shall exceed £——, and that the surplus of the share shall be applied as if the child had died before the testator without leaving issue.

Advances.

*Seventhly.* Sometimes it is directed that advances already made, or which may subsequently be made, by the testator to any child, or any sums which he or his executors may have to pay by virtue of his covenants contained in the child's marriage settlement, shall be brought into hotchpot in estimating the value of the child's share. (2 K. & E. 757; see as to clauses of this nature, 4 Dav. Prec. 157 (*q*); notes to *Ex p. Pye*, in 2 W. & T. L. C.; *Re Cosier* (1897), 1 Ch. 325, affirmed *sub nom Wheeler* v. *Humphreys*, (1898) A. C. 506; *Re Lambert*, (1897) 2 Ch. 169.

Accruer.

Where the gifts of the residue to children are *nominatim*, the gift to any child of the testator dying in the testator's lifetime without leaving issue who survive the testator, and the gift to the child of any other person dying in the testator's lifetime, whether leaving such issue or not, is undisposed of, and passes to the testator's statutory next

of kin. To avoid this, it may be declared that such share shall sink into the residue, and be applied as if it had not been given to the named child. (2 K. & E. 770, and see *Re Palmer* (1893), 3 Ch. 369, *ante*, p. 465.)

Hotchpot.

As to the hotchpot clause, see *ante*, p. 348. If the scheme of the will is to give the residue *in specie* without conversion, it will be proper to authorise the trustees to make a valuation for the purpose of giving effect to the clause (see form in 2 K. & E. 758).

Maintenance and accumulation.

In cases where the shares are contingent, as where they vest at twenty-one, &c., in the usual manner, the maintenance and accumulation clauses are often omitted in reliance on s. 43 of the C. A. 1881 (*ante*, p. 350).

Intermediate Income.

It must be remembered, however, that s. 43 does not apply unless the infant would if he had attained twenty-one, &c., become entitled to the past income as well as the corpus of the property. (*Re Dickson*, 29 Ch. D. 331.) If the gift is of a share of residue, the infant is entitled to intermediate income, and s. 43 applies (*d*). After some difference of judicial opinion, it has been decided by the Court of Appeal that s. 43 applies to cases in which there is a gift to a class to vest in such as attain to twenty-one, &c., in the usual form, (*e*) and even though the class be capable of increase (*f*). Where the gift is not residuary, but is of a general legacy (either contingent or payable *in futuro*), it does not entitle the legatee to the income accruing before the time named for vesting or payment, but such income forms part of residue: unless there is an express gift of interest or income in the meantime, or the testator is the father of, or *in loco parentis* to, an infant legatee, or the fund is directed to be immediately separated from

(*d*) *Countess Bective* v. *Hodgson*, 10 H. L. C. 656. And this applies where the residue consists of both realty and personalty given together as a mixed fund, though the realty be not directed to be sold; *Genery* v. *Fitzgerald*, Jac. 468.

(*e*) *Holford* v. *Holford* (1894), 3 Ch. 30 (overruling *Re Jeffery* (1891), 1 Ch. 671.

(*f*) *Re Jeffery* (1895), 2 Ch. 577.

the rest of the estate and set apart for the benefit of the legatee(*g*).

It should also be remembered that the provisions of s. 43 do not apply to cases where the vesting is postponed till after twenty-one (*Re Judkins Trusts*, 25 Ch. D. 743), and to some other cases (*h*), as for instance, where there is an immediate gift, subject to be divested by the exercise of an overriding power of appointment or by the operation of an accruer clause on death under a certain age; and that occasionally, where there is real estate, the discrepancy between the destination of the accumulations under the C. A. 1881, s. 42 and s. 43 respectively, must be provided against (see *ante*, p. 351). In cases to which s. 43 of the C. A. 1881 does not apply, either express maintenance and accumulation clauses, or provisions supplementing the statutory powers, should be inserted.

When the vesting is postponed, it will require consideration whether the maintenance clause should be extended so as to include the period between the legatee attaining twenty-one, and the time at which he becomes entitled to payment of his legacy, or whether the whole income should be made payable to him as from his attaining twenty-one. If the latter course be adopted, it must be remembered that, unless the gift be to such children as attain twenty-five, &c., such a gift of interest would make the legacy vest at twenty-one, unless the contrary is clearly expressed, and therefore care must be taken to exclude this result (see 2 K. & E. 775).

It is convenient to allow the moneys for the time being applicable for maintenance, to be applied as a common fund for the maintenance of all the children entitled thereto (2 K. & E. p. 773). If the testator has many children, so that it is unlikely that, on the death of his widow, any

(*g*) *Re Clements* (1894), 1 Ch. 665; *Re Snaith*, W. N. 1894, 115; *Re Moody*, (1895) 1 Ch. 101; *Re Woodin*, (1895) 2 Ch. 309. See the rules as to intermediate income laid down in 35 Sol. J. 150, 238, 572, 37 Sol. J. 263, 281, and Theob. Wills, 149 *et seq.*, and M. L. P. P. 372.

(*h*) See 2 K. & E. 477, note.

member of the family will take all the children to live with him, it may be convenient to authorise the application of the maintenance money in taking a house and keeping up an establishment for the infants, with power to allow any of the adult children to share the benefit, either with or without contributing towards the expenses (2 K. & E. 781).

When the property is small, it is desirable to give a power of maintenance out of capital.

Power of advancement.

Where the residue consists, or may consist, of realty or leaseholds, the power of advancement should include a power to determine the value of the share of the child being advanced, and a power to mortgage either the expectant share of the child being advanced, or, more conveniently, the whole residue for the purpose of raising the advance (see form in 2 K. & E. 780).

Maintenance of children of another person.

Where the will includes, on failure of the trusts for the testator's children, trusts for children of another person, either preceded or not by trusts for their parent for life, the express provisions as to maintenance, accumulation, and advancement, if any, should be extended so as to be applicable to their expectant shares. There are two methods of doing this. The provisions may be made applicable to the expectant shares of the children of each class, or the clauses may be inserted at length with reference to the shares of the testator's children only, and the provisions with respect to the shares of the other children may be declared by reference. Whichever scheme is adopted, the following matters must be attended to with respect to the provisions for the children other than those of the testator. The power of maintenance and the trusts for accumulation should not be made to take effect until the failure of all the trusts which precede those in favour of such children; the power of advancement should be made subject to all the trusts preceding the trusts for such children, except those, if any, in favour of their parent, and should be exercisable during the parent's lifetime with his consent. It may be desirable to provide that, on failure of the testator's children in his widow's

lifetime, the power shall be exercisable with the consent of the widow and of the children's parent, or the survivor.

In cases where there are some minors presumptively entitled to shares of residue, and the same or others entitled to legacies, it is convenient to combine the express provisions as to maintenance, accumulation, and advancement, if any, as to the shares of residue and legacies, in the same clauses (2 K. & E. 776). In all cases where the children, for whom maintenance is to be provided, have a father who is not rich, and does not take a life interest, and an express power of maintenance is inserted, it is advisable to make it exercisable, as the statutory power is, without reference to the father's ability; for, if this provision is not made, the trustees cannot safely provide maintenance for the children during their father's lifetime. Where the trustees have such power, the Court will not control their *bonâ fide* exercise of it. (*Brophy* v. *Bellamy*, L. R. 8 Ch. 798; *Re Lofthouse*, 29 Ch. D. 921; *Re Bryant* (1894), 1 Ch. 324.)

Children adults.

When at the time of the testator's death most of the children are adults, the scheme suggested at p. 466 is sometimes adopted, with the variation of giving to each child an immediate legacy, or an annuity during its mother's life; and, in the event of a child marrying and dying in the testator's lifetime leaving issue, the substitution of such issue for their parent (*ante*, p. 471). Sometimes the widow is provided for by giving an annuity, and the use of a house and furniture, to her for life; and such part of the testator's property as is not required for such purposes is divided immediately among the children.

Settled legacies.

Sometimes, where the scheme of the will is to provide for daughters, either by means of legacies or by shares of residue, their legacies or shares are settled (2 K. & E. 758, *et seq.*). In this case, the trusts declared concerning each legacy or share may follow closely the usual trusts in a settlement of personal property, with the exceptions—*first*, that, if a daughter be unmarried at the date of the will, it is better to give her a power (to be exercised while not

under coverture by deed, and while under coverture by will) to appoint a life interest to any husband who may survive her, than to give him a life interest under the will itself; *second*, that the trusts for the daughter's children should not be confined to those by any particular husband; and, *third*, a power may often with advantage be given to the trustees, to be exercised with the consent of the daughter in contemplation of her marriage, to revoke by deed the trusts declared concerning her share, and to make a different declaration of trusts for the benefit of herself, her intended husband, and her issue. This will enable a bargain to be made for a settlement by the husband on the occasion of her marriage.

There are two methods of framing the trusts of settled legacies or shares of residue. In either case the legacies or shares of residue are usually in the first instance given absolutely to the respective legatees, either *nominatim* or as a class, and in a subsequent part of the will the trustees are directed to retain the legacies and shares, and to hold them on the specified trusts (*i*). If the trusts of each legacy or share are similar with the exception only of the names of the beneficiaries, they may conveniently be declared together. (2 K. & E. 843.) If the trusts of the legacies or shares are dissimilar they must be declared separately; and in this case it will sometimes conduce to brevity to declare the trusts of some of the shares by reference to the trusts of the share first mentioned, introducing the variations with the words "save and except, &c." (2 K. & E. 762, 844.) Where the testator's widow takes a life estate in the whole property, or where for any other reason the trust for investment precedes the trust for division into shares, or where there is a power to postpone the conversion, power should be given to the trustees to allot specific property in satisfaction of each share; and it may be declared that, after the

(*i*) It must be noted that in such cases, if there is no gift over on failure of the objects of the trusts, the absolute gift may remain unaffected; see *Lassence* v. *Tierney*, 1 Mac. & G. 551; Theob. Wills, 396. As to the effect of the legatee dying before the testator, *Re Pinhorne* (1894) 2 Ch. 276.

death of the widow, the consent of the tenant for life of each share shall be necessary for any change of investment of the property appropriated for such share.

If the shares are given as money, a trust for the investment of each share should be inserted.

Where the scheme of the will is to convert the residue and settle the proceeds and also to give immediate settled legacies, it will generally be found convenient to direct the legacies and net proceeds of conversion to be invested "in or upon the stocks, funds, shares, and securities hereinafter mentioned in that behalf," and by a subsequent clause to direct the trustees to invest "the net proceeds of the conversion of my residuary estate, and every legacy which shall not be absolutely vested in possession and immediately payable or transferable in or upon, &c."

Ultimate trusts.

The frame of the ultimate trusts, in default of the children taking, must depend upon circumstances. If the testator has brothers and sisters, the trust may be for such of them as survive the testator, and the children, living at the testator's death, of such of them as die before the testator, equally *per stirpes*. (See form in 2 K. & E. 767). If some of the testator's children have already attained or nearly attained twenty-one, or if he has several children, the ultimate trust may be omitted: for the only case in which it will take effect is the unlikely one of no child attaining a vested interest; and it must be remembered that, should all the children die during the testator's lifetime, he can make a new will.

Guardian.

The father has power by deed or will to appoint a guardian or guardians of his infant children not married at the time of his death (12 Car. 2, c. 24, s. 8), and to authorise a guardian or surviving guardian to appoint a new guardian in the place of one dying. (*Re Parnell*, L. R. 2 P. & D. 379.) It is, however, not necessary that the testator should name his wife as guardian of his infant children, for under the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), she will be guardian either alone or jointly with any guardian or guardians appointed by him. By the same Act a mother

may by deed or will appoint guardians or a guardian to act after the deaths of both parents; and if both parents appoint guardians, they act jointly. A mother may also provisionally appoint guardians to act jointly with the father in case of his unfitness to be sole guardian, subject to confirmation by the Court of such appointment (*k*). Although a father has not a legal right to appoint guardians of his illegitimate children, the Court will usually appoint the person named by him as guardian. (*Peckham* v. *Peckham*, 2 Cox, 46; *Chatteris* v. *Young*, 1 Ja. & W. 106.)

Testator's marriage invalid.

Occasionally doubts may exist whether the testator's marriage is valid or not, or whether some or all of his children are illegitimate. It is extremely painful to the feelings of the family that any statement of the doubts should appear on the will, which, on its admission to probate, will become a public document. The plan adopted in this case in making gifts to the widow or children is to describe the person who is the object of the testator's bounty so clearly that (even if it should be proved that the superadded description of "wife," "son," "child," &c., is incorrect) there can be no doubt as to the person intended.

Gift to woman to whom the testator is not lawfully married.

A gift by will to a person with whom the testator has gone through a marriage ceremony, and with whom he has always lived as husband, by the description of "my wife," will, if the person be sufficiently designated, entitle her to take the gift, even if the marriage be entirely void, in the absence of fraud on her part in concealing the facts that render the marriage invalid (*l*). If the testator has a lawful wife alive, a description of the person passing as his wife by her Christian name as "my wife Sarah," where his lawful wife's name is (*e.g.*) Elizabeth, might be sufficient (*m*).

(*k*) See *Re G.*—(1892), 1 Ch. 292.

(*l*) *Kennell* v. *Abbott*, 4 Ves. 802; *Re Petts*, 27 Beav. 576; *Pratt* v. *Matthew*, 22 Beav. 328.

(*m*) *Dilley* v. *Matthews*, 2 N. R. 60; *Doe* d. *Gains* v. *Rouse*, 5 C. B. 422; *Lepine* v. *Bean*, L. R. 10 Eq. 160; *Melvish* v. *Milton*, 3 Ch. D. 27. See as to the effect of a gift of an annuity to the wife "during widowhood" where the marriage was void *ab initio*, *Re Boddington* 25 Ch. D. 685.

Gifts to illegitimate children (*n*).

The case of gifts to children of doubtful legitimacy, or, where, though they are clearly bastards, the testator wishes to conceal the facts, presents very considerable difficulty to the draftsman, owing to the rule of construction that any such words as "sons," "children," or "issue," *primâ facie* mean legitimate sons, children, or issue (*o*), though the words may, under the circumstances, or from the context, be construed to mean bastards (*p*). If, therefore, the testator wishes to provide for an illegitimate child of his own, or of any other person, he must mention the child by name, or otherwise clearly designate him or her.

Where some or all of the testator's children are bastards, but it is thought desirable to conceal the fact, the best course appears to be to mention all the children *nominatim* the first time that they are mentioned as a class: thus, "I give to my children, John, aged eight years, Thomas, aged four years, and Mary, aged one year." In subsequent parts of the will, when mentioning them as a class, it will be sufficient to describe them as "my said children" (*q*).

Gifts to future illegitimate children.

It was formerly considered that a gift could not be made by will to a bastard unborn at the date of the will; but it has been decided that this does not apply to bastards born after the date of the will in the testator's lifetime, or *en ventre sa mère* at the date of his death, though such a gift is void as to children not in existence at the testator's death.

(*n*) See 2 Jarm. Wills, 1076 *et seq.*; Theob. Wills, 239 *et seq.*, 2 K. & E. 851.

(*o*) *Dorin* v. *Dorin*, L. R. 7 H. L. 568; *Paul* v. *Children*, L. R. 12 Eq. 16; *Re Ayles*, 1 Ch. D. 282; *Ellis* v. *Houstoun*, 10 Ch. D. 236; *Megson* v. *Hindle*, 15 Ch. D. 198. As to a gift to "relations" of an illegitimate son, see *Re Deakin* (1894), 3 Ch. 565.

(*p*) *Holt* v. *Sindrey*, L. R. 7 Eq. 170; *Savage* v. *Robertson*, L. R. 7 Eq. 176: *Lepine* v. *Bean*, L. R. 10 Eq. 160; *Crook* v. *Hill*, L. R. 6 Ch. 311, S. C. sub nom. *Hill* v. *Crook*, L. R. 6 H. L. 265; *Laker* v. *Hordern*, 1 Ch. D. 644; *Re Harrison* (1894), 1 Ch. 561; *Re Plant*, 43 Sol. J. 63. There are a few exceptions to the general rule, which are discussed in Hawk. Wills, 80.

(*q*) For the effect of using the word "children" only in the subsequent part of the will, see Hawk. Wills, 84.

The result of the authorities appears to be that illegitimate children, born between the date of the will and the testator's death, may take under a gift in which they are sufficiently described; as where the gift is to reputed children, and the fact of reputation is established; and a child *en ventre sa mère* may take if particularly referred to by the testator; but that if the illegitimate children are defined solely with reference to their paternity, as distinguished from the reputation of paternity (*e.g.*, as the children *of* the testator by a named woman, or the children of A. by a named man), the gift fails, because the law forbids inquiry into the fact of paternity in such cases (*r*). To avoid all risk, it appears proper that a testator whose marriage is invalid should, immediately after the birth of each child, make a codicil or fresh will providing for it. There are several methods in which this can be done. If the testator wishes to provide for his bastard children as a class, probably he might declare that in his will the phrase "my children" should mean John, aged eight years, Thomas, aged three years, &c., now residing with me at ——. Then on the birth of another child, Mary, he might declare by codicil that the phrase "my children" in the will should mean John, Thomas, and Mary.

Whenever a gift is made to a bastard under the age of twenty-one years, a gift over should be made on the event of his death under twenty-one, so as to exclude the title of the Crown.

Power of leasing.

Where the residue is given on such trusts that no person *sui juris* immediately becomes the owner of it, and part of it consists of real estate or leaseholds, it is proper to insert powers of leasing, unless some person is a tenant for life within the meaning of the S. L. Acts and the statutory powers are relied on.

Trustee clauses.

The trustee and executor clauses consist of:—(*s*)

(*a*) Power to trustees to determine the subject-matter of

(*r*) *Occleston* v. *Fullalove*, L. R. 9 Ch. 147, explained in *Re Bolton*, 31 Ch. D. 542; and *Re Hastie*, 35 Ch. D. 728.

(*s*) See for other clauses, 2 K. & E. 815, *et seq.*

specific bequests, to apportion blended trust funds, and to settle questions (see *ante*, p. 333).

(*b*) A receipt clause (see *ante*, p. 332).

(*c*) A power to appoint new trustees (see *ante*, p. 357).

(*d*) Clauses for indemnity and reimbursement of the trustees (see *ante*, p. 363).

(*e*) Appointment of executors.

(*f*) Power to executors to arrange and compromise (see *ante*, p. 333).

(*g*) Power to executors and trustees to charge for business done professionally.

Clauses (*b*), (*c*), (*d*), and (*f*) may be omitted in reliance on the statutory powers. (See *ante*, chap. xi., SETTLEMENTS.)

Devise of trust and mortgage estates.

In wills before 1882 it was the practice to make a devise of trust and mortgage estates so as to avoid the inconvenience that might occur in case of the legal estate descending to an infant heir. This should now never be done, except where the testator has mortgage or trust estates in colonial property vested in him, or has been admitted to copyholds which he holds as trustee or mortgagee. (See the C. A. 1881, s. 30, and the Copyhold Act, 1894, s. 88, replacing the Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45, *ante*, p. 148.)

Property in different countries.

Where the testator has personal property in different countries, *e.g.*, some in England and some in a British colony, it is convenient to appoint different executors with respect to the property situated in the different places. In such a case, if the property is to be vested in trustees, it is desirable to authorise distinct sets of trustees to act in respect of the different properties. Either of the following plans may be adopted :—*First*, different sets of trustees may be appointed for the property in the different countries ; but there is a disadvantage in adopting this plan, where part of the property is in a colony, owing to the fact that colonists often leave the colony and return to England, so that frequent appointments of new trustees of the property in the colony may become necessary. *Second*, the trustees for

the time being in either place may be authorised to act with respect to the property there as if they were the only trustees, with power to the trustees in either place to give a power of attorney to those in the other place to execute leases, conveyances, &c., in the names of the former, without being responsible for any loss occasioned by any improper exercise of the power.

Codicil (*t*).

A codicil should never be used for the purpose of making extensive alterations in a will, on account of the difficulty in framing the dispositions made by it so as not to be inconsistent with those of the will; but it may be properly employed for such purposes as substituting one person for another as trustee or executor, giving a legacy to a person not taking any benefits under the testator's will, or revoking, or altering the amount of a legacy given in the will. In the last case care should be taken to state expressly whether the gift made by the codicil is in addition to, or in substitution for, that made by the will; for the rule of construction is that, in the absence of special directions, the legatee is entitled to both gifts (Hawk. Wills, 303; Theob. Wills, 122). It is hardly necessary to observe that no draftsman ought ever to attempt to prepare a codicil to a will unless he has the will before him.

Gift to attesting witness.

It may be noticed that any person to whom, or to whose wife or husband, any benefit is given by a will (or codicil) should not be an attesting witness to the will (or codicil): for this would make the gift void (*u*).

(*t*) M. L. R. P. 391, 401. (*u*) The Wills Act, 1837, ss. 14, 15.

## CHAPTER XIII.

### PART I.—DISCLAIMER.

Any person may disclaim.

"THE law is not so absurd as to force a man to take an estate against his will. *Primâ facie*, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given. Of that, however, he is the best judge, and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly by some mode or other allow him to renounce or refuse the gift;" (per Abbott, C.J., *Townson* v. *Tickell*, 3 B. & Ald. 31 at p. 36; *Peacock* v. *Eastland*, L. R. 10 Eq. 21), but not after he has accepted it (*Hurst* v. *Hurst*, 21, Ch. D. 278). Acceptance of a gift is presumed in the absence of evidence of refusal or disclaimer (*Standing* v. *Bowring*, 31, Ch. D. 282; *London & Co. Bkg. Co.* v. *London & River Plate Bk.*, 21 Q. B. D. 535; *Re Arbib and Class*, (1891) 1 Ch. 601.

In practice the ordinary case of disclaimer is that by a trustee or executor; and it will be convenient to consider these cases separately.

The words "disclaim" and "renounce" are used indifferently with reference to property and to an office.

Accepting trustee cannot afterwards disclaim.

A person who has once accepted a trusteeship will not be allowed afterwards to disclaim any of the trust property; for the very fact of his accepting the office (as, for instance, by his executing a deed by which he is appointed trustee, or by which some of the trust property is conveyed to him) indicates his willingness to accept the property, which, when it has once vested in him, can only be taken out of him by the appropriate method; and therefore it is always desirable to procure the execution of a trust deed by all the

trustees. Similarly he cannot afterwards disclaim his office, when he has once accepted it, merely by refusing to act. To enable him to retire his *cestuis que trustent* must acquiesce in his discharge from the office of trustee, or a new trustee must be appointed in his place; or where there are more than two trustees, he can retire with the consent of his co-trustees and of the person, if any authorised to appoint new trustees under the Trustee Act, 1893 (*ante*, p. 362).

Effect of disclaimer by trustee.

If one of several trustees disclaims, the trust estate vests in the trustees who accept, in the same manner as if the person disclaiming had not been appointed a trustee (*Smith* v. *Wheeler*, 1 Vent. 128, 2 Keb. 774; *Townson* v. *Tickell*, 3 B. & Ald. 31; *Begbie* v. *Crook*, 2 Bing. N. C. 70; *Adams* v. *Taunton*, 5 Mad. 435). When a valid disclaimer is made, it relates back, and therefore it makes no difference that the disclaimer is not executed till after the death of the survivor of the trustees who accept, in which case the effect of the disclaimer is to vest the legal estate in the heir of such survivor, or, if he died after 1881, in his personal representatives (*a*). And so a disclaimer may be effectual though executed after an agreement has been entered into by the accepting trustees for a sale of the trust property (*Peppercorn* v. *Wayman*, 5 De G. & Sm. 230).

If all the trustees disclaim, or a sole trustee disclaims, the property remains in the grantor or is in the heir of the testator.

A trustee cannot disclaim a part only of the trusts (*Urch* v. *Walker*, 3 My. & C. 702), or the trusts of part only of the property (*Re Lord & Fullerton*, (1896) 1 Ch. 228). But two of three devisees in trust are not, by accepting the trust, debarred from disclaiming the legal estate in copyholds in order to avoid the larger fine which would be payable on admittance if all three had to be admitted tenants (*Wellesley* v. *Withers*, 4 El. & Bl. 750).

Deed of disclaimer.

It would seem that a trustee who declines to act cannot

(*a*) See as to copyholds, *ante*, p. 176.

be compelled to execute a disclaimer; but the usual course in cases of importance is for him to execute a deed poll, whereby "it is witnessed that he the said A. B. doth hereby absolutely renounce and disclaim" the trust property and all the trusts and powers reposed in him. Some practitioners employ the past as well as the present tense, saying, "Hath renounced and disclaimed and by these presents doth renounce and disclaim," with the intention of showing that the trustee never accepted the trusts; but it is better to insert a recital to that effect.

The disclaimer appears to operate merely as a convenient way of solemnly asserting the intentions of the person disclaiming. Care must be taken not to insert a conveyance by the person disclaiming; for, as this would show that he had accepted the trust estate, it is clear that he could not effectually disclaim it. (*Crewe* v. *Dicken*, 4 Ves. 96; *Nicloson* v. *Wordsworth*, 2 Swanst. 365.)

By trustees of strict settlement.

It is perhaps not obvious that the trustees of a strict settlement (in the form in use before 1883), who take no estate in the land, can, by renouncing their office, disable themselves from executing the powers of sale, &c., which are powers *simply collateral*, and as such could not be extinguished by the act of the donee before 1881 (*b*). If, however, we look at the intentions of the parties as expressed in the settlement, we find on the construction of the whole settlement that the powers of sale, &c., are to be exercised by the persons who, for the time being, fill the office of trustees; and it follows that, on the renunciation *ab initio* of his office by a person named as trustee, he cannot execute any power annexed to that office. It has even been held that, where land is devised to a trustee, conduct which amounts to a disclaimer of the office (*Re Birchall*, 50 Ch. D. 437), or renunciation of probate and not acting as trustee, even without any express disclaimer of the office (*Re Gordon*, 6 Ch. D. 531), operates as a disclaimer of the legal estate.

(*b*) Co. Lit. 342 *b*, n. 1. II.; C. A. 1881, s. 52, *post*, p. 493.

By heir, &c., of trustee.

It appears to be very doubtful whether, after the death of a trustee who has neither acted nor disclaimed, his heir or personal representative can disclaim. If the estate ever was in the person appointed trustee, it must on his death devolve on his heir or personal representative; and it seems to have been assumed in *Goodson* v. *Ellisson* (3 Russ. 583) that the heir must show some act of renunciation by his ancestor to discharge himself from the liability to execute a conveyance at the request of his *cestui que trust*.

Renunciation by executor.

An executor who has not acted can renounce by a formal proceeding in the Probate Division. Formerly, if there were several executors, and one renounced or did not prove, and the rest proved, he might afterwards have proved; so that if an executor, who had proved, died, leaving another, who had renounced or had not proved, surviving, the representation did not belong to the executor of the deceased executor. (*Cottle* v. *Aldrich*, 4 M. & S. 175.) The rule is now changed by the Court of Probate Acts, 1857 and 1858, 20 & 21 Vict. c. 77, s. 79, and 21 & 22 Vict. c. 95, s. 16, by the combined effect of which, where any person renounces probate or dies without having proved, or is cited to take probate and does not appear, "the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor. See *Crawford* v. *Forshaw*, (1891) 2 Ch. 261.

Where the same person is appointed executor and trustee and proves the will, he cannot disclaim the trusteeship of personalty (*Mucklow* v. *Fuller*, Jac. 198), though he can, if the testator dies before 1898, disclaim the trusteeship of the realty; (*Wellesley* v. *Withers*, 4 El. & Bl. 750; *Bence* v. *Gilpin*, L. R. 3 Ex. 76, at p. 82): but probably, if his testator dies after 1897, he cannot disclaim the trusteeship of the freeholds (though he may disclaim the trusteeship of

the copyholds), as the freeholds vest in him *virtute officii*: L. T. A., 1897, s. 1.

By executor of executor.

It is now settled that an executor who proves a will cannot renounce the executorship of any person of whom his testator was a proving executor, on the principle that a man cannot accept part of the duties of an executor, and refuse the rest. (*Brooke* v. *Haymes*, L. R. 6 Eq. 25; *Re Griffin*, Ir. Rep. 2 Eq. 320; *Re Delacour*, Ir. Rep. 9 Eq. 86.)

By married woman.

The Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), which (s. 77, *ante*, p. 137) enables a married woman "to dispose of" lands of any nature by deed acknowledged, does not appear to enable her to disclaim them; but by the Real Property Act, 1845 (8 & 9 Vict. c. 106, s. 7), a married woman can, after the 31st of October, 1845, by deed acknowledged, disclaim any estate or interest in hereditaments of any tenure. The necessity for acknowledgment does not appear to have been done away with by the M. W. P. A. 1882.

Disclaimer of power.

The C. A. 1882, s. 6, provides that a person to whom any power, whether coupled with an interest or not, is given by an instrument coming into operation before or after the commencement of the Act, may by deed disclaim the power, and that after disclaimer the power may be exercised by the other person or persons in whom the power was vested.

It appears doubtful whether a married woman can disclaim a power by virtue of this section where it is not coupled with an interest (*c*).

Appointment of new trustee by disclaiming trustee.

Where an express power of appointing new trustees is inserted, it is generally made exercisable by a trustee who refuses to act. (*Ex parte Hadley*, 5 De G. & S. 67.) Where this is the case, and the disclaimer expressly excepts the power vested in the disclaiming trustee of appointing new trustees, or where there is no express power, so that a

(*c*) See W. R. & C. pp. 112, 267: but *see contra*, *Hood and Challis* on Conveg. Acts, p. 176.

new trustee can be appointed under the statutory powers conferred by the Trustee Act, 1893, the disclaiming trustee can exercise the power of appointing new trustees; but if he does, he must not convey the trust property, for this would be repugnant to the disclaimer (*d*). The property must be conveyed to the new trustees by the person who would have so conveyed if the disclaiming trustee had not been named in the settlement or will as a grantee or devisee.

## PART II.—RELEASES.

When release can be demanded.

It is the usual practice on the final adjustment of accounts between a trustee or executor and his *cestuis que trustent* for them to execute a release to him under seal. Disputes sometimes arise as to whether the trustee or executor is, strictly speaking, entitled to anything more than a simple receipt for the moneys handed over by him. The doctrine is laid down in *King* v. *Mullins*, 1 Drew. 311, by Kindersley, V.C., in the words following:—

"I am of opinion that, in the case of a declared trust, where the trust is apparent on the face of a deed, the fund clear, the trust clearly defined, and the trustee is paying either the income or the capital of the fund; if he is paying it in strict accordance with the trusts, he has no right to require a release under seal. It is true that in the common case of executors, when the executorship is being wound up, it is the practice to give executors a release. An executor has a right to be clearly discharged, and not to be left in a position in which he may be exposed to further litigation. Therefore he fairly says, unless you give me a discharge on the face of it protecting me, I cannot safely hand over the fund; and therefore it is usual to give a release; but such a claim on the part of a trustee would, in strictness, be improper, if he is paying in accordance with the letter of the trust. In such a case he would have no right to a release."

It appears to follow that, in the common case of the trust moneys having been resettled, the trustees or executors

(*d*) *Crewe* v. *Dicken*, 4 Ves. 97; *Urch* v. *Walker*, 3 My. & C. 702.

of the original settlement or will are entitled to a release under seal, from their *cestuis que trustent*, though they are entitled only to a mere receipt from the trustees to whom they pay the moneys. (*Re Cater's Trusts*, 25 Beav. 336.) But on the other hand, where a married woman, having a general power of appointment by will, appoints the fund in pursuance of the power and appoints executors, the trustees of the fund can safely hand it over to the executors on their receipt, and cannot demand a release under seal from the beneficiaries. (*Re Hoskin's Trusts*, 5 Ch. D. 229; 6 Ch. D. 281.)

Dealings should be at arm's length.

It is always desirable that the person giving the release, and the trustee, should be advised by different solicitors, and that the dealings between them should be at arm's length. This is of the utmost importance where the trustee stands in such a relation to his *cestui que trust* that the latter is unlikely to form an independent judgment as to the propriety of the transactions in respect of which the release is given. (*Rhodes* v. *Bate*, L. R. 1 Ch. 252; *Lyon* v. *Home*, L. R. 6 Eq. 655.) Where the trustee and *cestui que trust* stand towards each other in the relationship of parent (*Turner* v. *Collins*, L. R. 7 Ch. 329) or person *in loco parentis* (*Kempson* v. *Ashbee*, L. R. 10 Ch. 15) and child, or solicitor and client (*Morgan* v. *Minett*, 6 Ch. D. 638), it is not to be supposed that the *cestui que trust* can as a rule form an independent judgment; and accordingly, the release is liable to be set aside by the Court, on his application, unless he has been advised by an independent solicitor, and even if he has, if it can be shown that he executed it under the influence of the trustee. (*Moxon* v. *Payne*, L. R. 8 Ch. 881.) A release has even been set aside more than twenty years after execution and notwithstanding the death of the trustee, on the evidence of the plaintiff, corroborated by the contents of the deed, that it was executed in error (*Re Garnett*, 31 Ch. D. 1).

Form of release.

The release is generally effected by an indenture between the *cestuis que trustent* and the trustee: which, owing to

the doctrine that, where the release contains any recitals, the operative words will be construed as having reference only to the matters set forth in the recitals (*Payler* v. *Homersham*, 4 M. & S. 423) should contain very full recitals setting forth the title of the parties giving the release, and the matters in respect of which the release is intended to be granted (*e*). In cases where the accounts are too long to set forth in the deed, they may be made up in a book, and signed by the parties, and the release will then contain a recital that the releasing parties have examined and are satisfied with the accounts. If any breaches of trust have been committed, they should be designated as such; and in such cases some practitioners insert a recital that the beneficiaries giving the release and the trustee to whom it was given were advised by different solicitors (naming them). The release should extend to retired trustees and to the estates of deceased trustees. Recitals.

Sometimes there is a difficulty in determining at what point of time the recitals should commence. If a release be given to the original trustees of a settlement, the recitals will of course begin with the settlement itself; but when new trustees have been appointed so long after the date of the settlement that many changes have occurred in the *cestuis que trustent* and the trust fund, it is not very easy to frame the recitals in a satisfactory manner. The duty of the draftsman is on the one hand not to encumber the deed by long statements of circumstances which occurred before the new trustees were appointed, and on the other hand to state such of the circumstances as are necessary to render his story intelligible.

The witnessing clause runs as follows: "that in pursuance of the said agreement, and in consideration of the premises," the said [*cestui que trust*] "doth hereby release Operative clauses.

(*e*) Where the recitals are imperfect, an attempt is sometimes made to adduce direct evidence of the intention of the parties; but this is of course rejected, though evidence as to their circumstances at the time of executing the release is admissible (*ante*, chap. ii.).

the said [*trustee*], his heirs, executors, administrators, estate and effects from the said [ ]" *or* "in respect of the said [ ] and all actions, suits, accounts, claims, and demands for or in respect of the same [ ] or for or in respect of anything in anywise relating to the premises."

Where there is any doubt as to the title of the *cestui que trust*, the deed also contains a covenant by the *cestui que trust* to keep indemnified the trustee, "his heirs, executors, administrators, estate and effects from all actions, suits, claims, and demands by [ ] in respect of," &c.

Sometimes the bulk of the trust funds is handed over by the trustees, but they retain such part as has not yet become payable. In this case the generality of the release may be qualified by a proviso that it shall not extend to the funds remaining in their hands.

If anything remains to be done by the trustees, as for instance, to surrender copyholds, a proviso is inserted that the release shall not operate till they have done so.

By whom prepared.

The release is drawn by the solicitor to the trustees, at the cost of the trust estate, and approved by the solicitor of the *cestui que trust*. There is sometimes a little practical difficulty as to costs, as the trustees may feel unwilling to part with the trust fund until their costs are provided for, and there may be some difficulty in ascertaining the amount before the deed has been executed. Sometimes the *cestuis que trustent* agree to pay the costs, and nothing is said about them in the deed; or the amount is estimated as nearly as can be be, and is stated in the deed to have been retained by the trustees in respect of their costs.

The trustee should be careful to ascertain, before he hands over the trust funds, that all legacy (*f*), succession (*g*),

(*f*) See M. L. P. P. 380.

(*g*) See the Succession Duty Act, 1853 (16 & 17 Vict. c. 51); the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), s. 41, exempting ancestors and descendants from the 1 p. c. succession duty on property which is included in an account under the last mentioned Act, and in respect of which duty

temporary estate (*h*), and account (*i*) duties, and all duties payable under the Finance Act, 1894 (57 & 58 Vict. c. 30), as amended by 59 & 60 Vict. c. 28; and 61 & 62 Vict. c. 10, s. 14, have been paid.

Release of powers.

By the C. A. 1881, s. 52, since 1881, any person to whom a power, whether coupled with an interest or not, is given, may by deed release or contract not to exercise it, whether it is created by an instrument coming into operation before or after the commencement of the Act.

By married woman.

Apparently at Common Law a married woman could not release a power. (Sugden on Powers, p. 92.) But, by statute, she can by deed acknowledged, with the concurrence of her husband, release or extinguish any power which may be vested in or limited or reserved to her "in regard to lands of any tenure" (Fines and Recoveries Act, 1833, s. 77); and, unless she is restrained from anticipation, "in respect of every future or reversionary interest whether vested or contingent in personal estate," arising under any instrument *made* (*k*) after 1857, not being her marriage settlement (Married Women's Reversionary Interests Act, 1857, s. 1). Until it has been decided that section 52 (above cited) of the C. A. 1881 applies to married women, it will not be proper to dispense with acknowledgments in the case of releases by them of powers relating to land or reversionary interests in personal estate, or to assume that the Act authorises them to release powers over personal property in possession. The M. W. P. A. 1882 does not appear to affect the question (*l*).

has been paid; the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21, imposing an additional 1½ p. c. succession duty, or, in the cases of ancestors or descendants, ½ p. c.; and the Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), s. 6, imposing an additional 1 p. c. on successions exceeding 10,000*l.* in value on the death of a person dying before June, 1896 (see s. 7).

(*h*) See the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), part ii.

(*i*) See the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38, amended by 52 & 53 Vict. c. 7, s. 11.

(*k*) *Re Elcom* (1894), 1 Ch. 303; *ante*, p. 203, n (*f*).

(*l*) See 1 K. & E. 88; but *contra*, *Hood and Challis*, Convg. Acts, p. 134.

By trustee.

It does not appear that the C. A. 1881, s. 52, authorises a trustee to release a power (*Re Eyre*, W. N. 1883, p. 153, 49 L. T. 259), if coupled with a duty.

## PART III.—APPOINTMENTS OF NEW TRUSTEES (*m*).

A new trustee may be appointed (α) by the High Court of Justice acting under the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25; (β) by a person duly authorised to do so by the instrument creating the trust; (γ) if there be no such person, or no such person able and willing to act, by the surviving or continuing trustees or trustee, for the time being, or the personal representatives of the last surviving or continuing trustee (Trustee Act, 1893, s. 10, re-enacting C. A. 1881, s. 31), in the cases mentioned in the section, unless the contrary is declared in the instrument creating the trust: (δ) by the persons named in Lord Cranworth's Act (23 & 24 Vict. c. 145) if the instrument creating the trust was executed before 1882, and incorporated that Act expressly or by implication.

There is, however, some doubt whether, in cases where the power in Lord Cranworth's Act was incorporated either expressly or by implication, it may not have been kept alive by the C. A. 1881, s. 71, which, after repealing the section of Lord Cranworth's Act conferring the power, provides that the repeal is not to affect the operation of instruments executed before the appeal. But, as the persons authorised by the Trustee Act, 1893, to appoint new trustees are in effect the same as those authorised by Lord Cranworth's Act, the question is not of practical importance.

The instrument of appointment.

We will confine our attention to the three cases (β), (γ), and (δ) above mentioned. The instrument of appointment is generally an indenture, although in most cases it is not absolutely necessary that the instrument should be under seal, unless it contains a vesting declaration under the Trustee Act, 1893, s. 12, or a conveyance of the trust

(*m*) See 1 K. & E. 99; The Trustee Act, 1893, by Ellis.

property, and the latter is of such a nature that it can only be conveyed by deed. The instrument should show by appropriate recitals: (1) either that a power of appointing new trustees exists by virtue of the instrument creating the trust, and who are the present donees of the power, or who are the present donees of the statutory power under the Trustee Act, 1893; (2) what the property is of which the new trustee is to be appointed; (3) that circumstances have occurred, such as the death, incapacity, or unwillingness to act of a trustee, which enable the power to be exercised.

Should be indorsed on the instrument creating the trusts.

It is convenient to indorse the instrument of appointment on, or to make it supplemental or read as an annex to the instrument creating the trust, so as to obviate the necessity of reciting it. If the appointment be indorsed, it will be unnecessary to recite in any subsequent appointment, also effected by indorsement, any of the facts recited in the earlier appointment; for a person reading an instrument is presumed to read not only such instrument but also everything indorsed on it.

Recitals.

It was formerly a very convenient practice to recite all the changes of investment made since the trust was created, so as to show that the property transferred to the new and continuing trustees properly represented the original trust funds; but it is now usual to recite shortly that "there have been divers changes in the investment of and other dealings with the trust funds comprised in or subject to the trusts of the within written indenture, and portions thereof have been applied or disposed of for advancement of children [*or, as the case may be*], and otherwise pursuant to the trusts and powers of the said indenture, and the trust funds now subject to the subsisting trusts thereof consist of, &c." The operative part of the instrument consists of (1) the clause appointing the new trustee; and sometimes (2) clauses transferring the trust property.

Operative clauses.

Clause appointing new trustee.

By the first of these clauses, the donee of the power "in exercise of the power for this purpose by the [*instrument creating the trust*] given to" him; *or*, "in exercise of the power for this purpose by

statute given to" him; *or* (where the statutory power is expressly incorporated in the instrument creating the trust) "by the joint operation of the [*instrument creating the trust*] and statute given to" him, "and of every or any other power in this behalf him enabling, doth hereby appoint the said A. B. to be a trustee in the place of the said C. D. for the purposes of the [*instrument creating the trust*]." This does not appear to require discussion.

Should the assignment of the trust property be contained in the instrument of appointment?

The question whether the trust property should be assigned by the instrument of appointment requires detailed consideration. (As to vesting it by declaration in the deed of appointment, see *ante*, p. 362.)

*First*, where the trust property consists of personalty which is transferable by delivery (other than furniture which is usually expressly assigned), or of personalty which is transferable in some statutory manner (as stocks, shares, debentures, and stock exchange securities generally, the transfer of which must be in the special manner required by statute or the regulations of the company or otherwise, and usually has to be registered), a recital is inserted in the instrument of appointment that the property is intended to be forthwith transferred to or into the names of the new and continuing trustees; and there is an agreement and declaration that the trustees shall stand possessed of it after the transfer or assignment, "upon the trusts and with and subject to the powers and provisions applicable thereto by virtue of" the instrument creating the trust. The transfer of the trust property is made in the appropriate manner immediately after the execution of the instrument appointing the new trustees.

*Second*, where the trust property is of such a nature that it can be transferred by a deed in the ordinary form, the transfer may be effected by the instrument of appointment itself if, immediately before the transfer is effected, the instrument creating the trust forms a link in the title to the property (*n*). If this is not the case, the transfer

(*n*) See as to vesting by declaration, *ante*, p. 362; 1 K. & E. 103, *et seq.*

should be effected by an independent instrument containing no statement of the property being affected by any trusts, so as to avoid complicating the title to the property by giving notice that it is trust property. (See 2 K & E. 223.)

Suppose, for example, that the trust property is a chose in action, as a policy or a reversionary interest, which was assigned, by the same instrument as that by which the trusts were declared concerning it, or is a mortgage bequeathed in trust: in either case the settlement, or the will, is a link in the title to the trust property; and no further complication of the title will be occasioned by making the transfer in the instrument by which the new trustees are appointed.

On the other hand, suppose that the trustees of a settlement have lent the trust moneys on a mortgage, which was prepared according to the ordinary form, not disclosing the fact that the money advanced was trust money (*ante*, p. 154); in this case it would introduce needless complication into the title of the mortgagor if the mortgage were transferred by the deed appointing new trustees of the settlement; and the transfer is properly effected by a separate deed (*ante*, p. 209). If there were several mortgages, each would be transferred by a separate deed, so that when any one of them was paid off, the mortgagor could have handed to him all the deeds affecting his own property.

When the property is to be vested in a new trustee and continuing trustee, and consists of freeholds, the continuing trustee "as trustee," so as to imply covenants against incumbrances (*ante*, p. 109), grants it to the continuing and new trustees and their heirs, to the use of the continuing and new trustees, and their heirs, so as to vest the fee simple in the continuing and new trustees by the C. A. 1881, s. 50. Before 1882 the continuing trustee conveyed to the new trustee and his heirs, to the use of the continuing and new trustees and their heirs, so as to vest the legal estate in the continuing and new trustees by the Statute of Uses. Where the property consists of leaseholds

or other personalty assignable at law (The Law of Property Amendment Act, 1859, 22 & 23 Vict. c. 35, s. 21), or a chose in action (C. A. 1881, s. 50), the continuing trustee "as trustee" assigns it to the continuing and new trustees so as to vest it in them. As to perfecting the assignment of a chose in action by notice, see *ante*, p. 192.

Land purchased under a power.

Where the trust property consists of land purchased under the usual power to invest in land in a settlement or will of personalty, and the conveyance on the purchase by the trustees was made to them upon the trusts declared by the will or settlement, it is usual, where new trustees of the settlement are appointed, for the conveyance of the land to be effected by an indenture, bearing even date with the appointment of the new trustees and indorsed on the original conveyance in trust. By this indenture the land is vested in the continuing and new trustees in fee simple, or other the estate of the trustees, "upon and for the trusts and purposes and with the powers applicable thereto by virtue of the said Indenture of Settlement" (or "Will").

Land settled on trust for sale.

Where the trust property is land conveyed on trust for sale by a deed of even date with the settlement (*ante*, p. 311), the new trustees of the land are not appointed by virtue of the power contained in or conferred by the settlement, but by virtue of that contained in or conferred by the conveyance in trust for sale. The deed of appointment may conveniently be indorsed on the conveyance in trust for sale. The operative clauses consist of, *first*, the appointment of the new trustees; *second*, a conveyance of the land to the continuing and new trustees and their heirs; or in deeds before 1882 to the new trustees and their heirs "to the use of the [*continuing and new trustees*] their heirs and assigns, upon the trusts and with and subject to the powers and provisions applicable thereto, by virtue of the within-written indenture." (See form in 1 K. & E. 116 (*o*).)

(*o*) An appointment of a new trustee of the settlement will be executed concurrently; 1 K. & E. 118.

The form of the appointment of a new trustee of a strict settlement will depend upon whether the trustee is to be a trustee of the powers, or for the purposes of the S. L. Acts and of the C. A. 1881, s. 42, or of the terms; and, in the first case, whether the old trustees have or have not an estate in the trust property. In old settlements, where the trustees of the powers were usually the trustees to preserve contingent remainders, the trustees usually took an estate in the trust property. In modern settlements the trustees take no estate. Strict settlement.

*First.* Where a new trustee of the powers is to be appointed, and the old trustees are the trustees to preserve contingent remainders. (See form in 1 K. & E. 119.) Trustees to preserve.

The operative parts consist of the appointment of the new trustees, a conveyance of the freeholds to the continuing and new trustees and their heirs (or in a deed before 1882 to the new trustee and his heirs) to the use of the continuing and new trustees and their heirs for the estates limited to the original trustees by the settlement "upon the trusts, &c., subsisting therein by virtue of" the settlement, or to adopt the longer form "upon the trusts, &c.," "which would have been now subsisting in the same premises by virtue of" the settlement, "in case this indenture had not been executed, and the said [new trustee] had been originally a party to and trustee of the within-written indenture instead of the said [retiring trustee], and the name of the said [new trustee] had accordingly been in the said indenture inserted throughout instead of the name of the said [retiring trustee]"; and, before 1882 a covenant against incumbrances by the continuing and retiring trustees severally with the new trustee; a covenant which is now implied by their conveying "as trustees," *ante*, p. 109.

*Second.* Where a new trustee of the powers or a trustee for the purposes of the S. L. Acts or the C. A. 1881, s. 42, has to be appointed and the trustees have no estate in the settled freeholds, the operative part consists merely of the appointment itself. Trustees of powers taking no estate.

Leaseholds.

Copyholds.

In either case if leaseholds are vested in the trustees, they may be assigned by the deed of appointment, or by a separate deed. If copyholds are vested in the trustees, the deed of appointment should contain a covenant to surrender them; and the surrender should be made immediately after the execution of the deed of appointment, though this is often omitted for the sake of saving expense.

Trustees of a term.

*Third.* Where a new trustee of one of the terms is to be appointed.

Here the form is similar to that in the first case except that the term is assigned by the old trustees of the term to the new and continuing trustees, "upon the trusts," &c., as in the first case.

Costs.

The costs of the appointment of new trustees and the transfer of the trust property are properly payable out of the corpus of the estate, although in practice they are often paid by the tenant for life (*Carter* v. *Sebright*, 26 Beav. 374).

No difficulty in indorsing the appointment.

Whenever on the appointment of new trustees it is convenient to indorse one instrument on another, the draftsman will remember that as all the deeds are prepared by the same solicitor, there is not that conflict of duties between solicitors which often interferes with the indorsement of one deed on another.

## PART IV.—DISENTAILING DEEDS.

General explanation.

The student is referred to M. L. R. P. 71 for a general explanation of the method of barring an estate tail. On reference to s. 15 of the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), he will find that a tenant in tail can dispose of the lands entailed for an estate in fee simple or for any less estate, as against the issue in tail and all persons whose estates are to take effect *after the determination or in defeasance of* his estate tail.

These words require some explanation. Suppose that the limitations be to A. for life, with remainder to B. in tail, with remainder to C. in tail, with remainder to D. in fee simple; with a proviso that if B. inherits a peerage, E. shall (subject

to A.'s life estate if he be living) become entitled in fee simple: then if B. (but during A.'s lifetime with his consent given in the manner prescribed by the Act) executes a disentailing deed before he inherits the peerage, he can dispose of an estate in fee simple (subject to A.'s life estate if he be alive) as against his own issue, as against the remaindermen C. and D., persons whose estates are to take effect after the determination of B.'s estate tail, and as against E., whose estate is to take effect in defeasance of B.'s estate tail.

Disposition to be inrolled.

The disposition by the tenant in tail must be effected by some one of the assurances (not being a will), by which the tenant in tail could have made the disposition if his estate had been "an estate at law in fee simple absolute:" and must be made or evidenced by deed inrolled (formerly in Chancery but now in the Central Office) "within six calendar months after the execution thereof;" Fines and Recoveries Act, 1833, ss. 40, 41.

Protector. (*p*).

When the estate tail, not being in possession, is preceded under the same settlement by "any estate for years determinable on the dropping of a life or lives or any greater estate not being an estate for years" (Fines and Recoveries Act, 1833, s. 22, and see ss. 23—33), then the owner of such preceding estate, or, if there be more than one such estate, the owner of the first of them, is called the "protector of the settlement." In certain cases (lunacy, &c.) the Lord Chancellor is protector. The tenant in tail cannot, without the consent of the protector, acquire more than a base fee, *i.e.*, an estate of inheritance so long as he and any of his issue who would have inherited the estate tail had it not been barred are alive; but this is subject to the exception that, if the tenant in tail be entitled to the reversion or remainder in fee immediately expectant on the determination of his estate tail, the consent of the protector is not required.

(*p*) The estate of the protector must be created by the same instrument as the estate tail; *Berrington* v. *Scott*, 32 L. J. (N. S.) 125. The settlor may appoint any number of persons *in esse*, not exceeding three, as protectors; Fines and Recoveries Act, 1833 s. 32.

It should be observed that, when a base fee and the remainder in fee belong to the same person, and there is no intermediate estate in existence, the base fee does not merge in the reversion; but is, *ipso facto*, enlarged into as large an estate as the tenant in tail could have created with the consent of the protector.

When an estate tail has been turned into a base fee, the person who would have been tenant in tail, if the entail had not been barred, can enlarge the estate tail into an estate in fee simple by a disposition under the Act; but, if there be a protector, his consent is required.

Who is protector when more than one estate precedes the estate tail?

It must be remembered that, where more than one estate sufficiently large to qualify the owner to be protector precedes the estate tail which is to be barred, the owner of the *first* of such estates which exists at any time is then the protector. Let the limitations be to A. for life, with remainder to his first and other sons successively in tail, with remainder to B. for life, with remainder to his first and other sons successively in tail. Suppose that A. is alive and B.'s eldest son wishes to bar his estate tail, then A. is the protector. Suppose, on the other hand, that A. is dead, and that he has left a son; then such son would be the protector, as regards all the remaindermen in tail.

Consent of protector how given.

The consent of the protector may be given in the disentailing assurance itself, or by a separate deed executed on or before the day on which the disposition is made. If the consent is given by a separate deed, the latter must be inrolled, either at or before the time when the disentailing assurance is inrolled.

Copyholds (*q*).

A legal tenant in tail of copyholds can disentail by surrender; an equitable tenant in tail, either by surrender or by a deed, which must be inrolled, within six months of its execution, on the court rolls of the manor. (*Gibbons* v. *Snape*, 1 De G. J. & S. 621.) The consent of the protector may be given by a deed entered on the court rolls; or,

(*q*) Fines and Recoveries Act, 1833, ss. 50 *et seq.* No inrolment in the Central Office is necessary; *Ib.* s. 54.

if the copyholds be conveyed by surrender, the consent may be given by the protector himself to the person taking the surrender.

Money subject to be invested in the purchase of lands can be disentailed, in the same manner as if the lands had been actually purchased. Money.

We will now consider the frame of the disentailing assurance. (See forms in 1 K. & E. 630, Stud. Prec. pp. 79 *et seq.*) Frame of the disentailing assurance.

In the very simple case where a tenant in tail in possession desires to acquire the fee simple, no recitals appear to be necessary. In the disentailing assurance he "grants" to a grantee to uses, the parcels (described "as situated in" *certain parishes*) of or to which he is seised or entitled at law or in Equity for any estate in tail male, or in tail under [*the instrument creating the estate tail*], or otherwise howsoever;" habendum, to the grantee and his heirs, "freed and absolutely discharged from all estates in tail male or in tail, either at law or in Equity of him, the said [*tenant in tail*], and all estates, rights, interests, and powers to take effect after the determination, or in defeasance of such estates in tail male or in tail, To the use of the said [*tenant in tail*], his heirs and assigns for ever." Tenant in tail in possession.

Sometimes the parcels are described still more generally, avoiding all reference to the instrument by which the estate tail is created.

If the tenant in tail is not in possession, whether the deed be executed with the concurrence of the protector so as to bar the estate tail, or without his concurrence so as to create a base fee, proper recitals should be inserted showing the exact nature of the interest of the tenant in tail. In the habendum say "Subject and without prejudice to the uses and estates limited or created by the said [*instrument creating the estate tail*], which are prior to the estate tail of the said [*tenant in tail*], and to the powers annexed to such prior estates so far as such uses, estates, and powers are subsisting or capable of taking effect." Tenant in tail not in possession.

The settled property often comprises money arising from Money arising from sales.

sales, &c., of the settled land, under the powers conferred by the settlement or by statute. The student may have some difficulty in seeing whether this ought to be dealt with as real or personal estate. If the settlement is not put an end to by the disentailing assurance, perhaps the better way is to convey "all that sum of £—— (*describing it*) and the hereditaments to be purchased therewith to A. (*a trustee*) in fee simple, habendum to A. in fee simple freed, &c., and subject, &c. (*as above*) to the use of the said [*tenant in tail*] in fee simple." But, if the effect of the disentailing deed is to put an end to the trust for re-investment, the money may be assigned to the trustee "free, &c.," as above, in trust for A., his executors, &c.

Where a base fee is to be enlarged, the parcels may be described as "all and singular the hereditaments situate at, &c., in which an estate in tail male, or in tail, at law or in Equity, has been barred and converted into a base fee, and of which the said ——, if such estate tail had not been barred, would have been actual tenant for such estate as aforesaid."

The student is referred to Shelford R. P. Stat. for a full exposition of the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74).

### PART V.—RESETTLEMENTS (*r*).

Where the protector gives his consent to the barring of an estate tail, he generally does so in contemplation of a resettlement. We will suppose that he is tenant for life under one of the settlements, analyses of which are given (*ante*, p. 365 and p. 429), that his wife is still alive, that he has a family, that his eldest son (the first tenant in tail) is about to be married, and that the father has agreed to give his consent to the barring of the son's estate tail, on condition of a resettlement being made. The settlement under which the father is tenant for life will be hereinafter referred to as "the original settlement."

(*r*) See 34 Sol. J. 208, 224.

What are fair terms of resettlement as between father and son.

It requires some consideration to determine what are fair terms for the resettlement as between father and son. On the one hand, if the son survive the father, he will be able to acquire the fee simple; on the other hand, he is unable during his father's lifetime, without his father's consent, to bar the remainders after his own estate tail; he can make no provision for his wife during his father's lifetime; nor, having regard to the possibility of the failure of his issue, can he make any certain provision for her after his own or during his father's lifetime; nor, if his estate be in tail male (so that the base fee which he can acquire without his father's consent will determine on the failure of his issue male), can he make a provision for portions for his younger children, which will be available for his daughters on the failure of his issue male. He has also nothing to live upon during his father's lifetime. It is generally considered fair as between father and son that, in consideration of the former charging his life estate with an annuity for the son during the joint lives of himself and his son, and with a jointure for the son's intended wife should the son predecease him, the son should agree to put down his own interest to an estate for life, with remainder, subject to a jointure for his wife and portions for his younger children, to his children successively in tail; with similar remainders in favour of his brothers and their children. It is a matter for discussion whether the limitations should be so framed as to exclude or admit the son's daughters; and, if they are admitted, whether they are to take successively in remainder one after the other, or concurrently as tenants in common in tail with cross remainders between them. Sometimes the son agrees to increase the jointure for his mother or the portions for his brothers and sisters.

Where the terms of the resettlement are of the nature above mentioned, supposing that the amount by which the mother's jointure or the portions for the son's younger brothers and sisters is increased is not excessive, there appears to be no appreciable risk of its being set aside by

the Court, although the son has no independent advice, if the solicitor employed for both parties carefully explains to him the nature of the transaction; but merely reading the deed over to an unprofessional person is not considered sufficient explanation to satisfy the rule. In many cases the son has already begun to contract debts, and it is consequently desired that the resettlement should seriously restrict his interests, as, for instance, by making his life estate determinable on alienation. In such cases, or where it is wished to raise money for the father's benefit, it appears absolutely necessary that the father and son should deal with each other at arm's length, and that they should employ different solicitors. (*Hoghton* v. *Hoghton*, 15 Beav. 278; *Dimsdale* v. *Dimsdale*, 3 Drew. 556; *Hartopp* v. *Hartopp*, 21 Beav. 259; *Jenner* v. *Jenner*, 2 De G. F. & J. 359; and see notes to *Stapilton* v. *Stapilton*, in 1 W. & T. L. C.)

Form of disentail and resettlement.

The disentailing assurance and resettlement can be carried into effect by one deed. This is, however, never done in practice, as the expense of inrolling a long deed is considerable. Usually two deeds are employed, the one being the disentailing assurance (limiting the property to such uses as the father and son shall jointly appoint, 1 K. & E. 633), the other the resettlement. Where the disentailing assurance and resettlement are made on the marriage of the tenant in tail, the practice is to have three deeds, *first*, the disentailing assurance; *second*, the resettlement, which provides an annuity by way of rent-charge for the son during his father's lifetime, and contains powers for him to charge the property with a jointure for his intended and any after taken wife, and portions for his younger children, and also contains the limitations agreed upon between the father and son; and *third*, a deed by which the son exercises the power of appointing the jointure and portions, and secures pin-money for his intended wife.

The student may inquire whether, when the bar of the estate tail and the resettlement are effected by different

deeds, the effect of the disentailing assurance may not be to confirm any prior voidable estates created by the tenant in tail (Fines and Recoveries Act, 1837, s. 38). The case of *Crocker* v. *Waine*, 5 B. & S. 697, decides that this is not the case if any valuable consideration is given to the tenant in tail for the resettlement.

Powers in gross or appendant to the father's life estate to be preserved.

Some of the powers contained in the original settlement, such as the powers to jointure, to charge portions, to charge a sum of money for the father's own benefit, are powers *in gross*, and cannot be exercised after he has concurred in a resettlement (*West* v. *Berney*, 1 Russ. & M. 431; *King* v. *Melling*, 1 Vent. 225; *Savile* v. *Blacket*, 1 P. Wms. 777). Other powers contained in the original settlement, such as express powers of leasing and the power to consent to the exercise of an express power of sale, are powers *appendant* to the father's life estate, and therefore, after he has alienated or charged it, they cannot be exercised without the consent of the alienee or the person entitled to the charge (3 Dav. Prec. 481 (*t*), 585 (*f*): unless in either case the father's right to exercise them be reserved either implicitly or expressly at the time when the resettlement, alienation, or charge, is effected. It will be observed that, when the resettlement and the deed charging the pin-money and jointure for the son's intended wife have been executed, both the son (in respect of his annuity) and his intended wife (in respect of her pin-money) will be incumbrancers on the father's life estate: so that it would be necessary for them to concur in every exercise of the powers appendant to the father's life estate, unless the right of exercising them without their concurrence was expressly reserved to him (*s*).

Father's life estate to be confirmed.

To obviate these inconveniences, where it is intended to preserve the powers, either expressly given to the father by the original settlement or exercisable by him as tenant for life under that settlement, it is the practice to limit to him in the resettlement an estate for life "in restoration and by

(*s*) This is not the case with regard to the statutory powers given by the S. L. Acts; see *ante*, p. 404.

way of confirmation of his life estate" under the original settlement; the effect being to put the father exactly in the same position as if he had not dealt with his life estate by the resettlement (*t*). It is also the practice to declare expressly in the resettlement that the powers exercisable by the father as tenant for life under the original settlement are to remain exercisable.

Powers of tenant for life under S. L. Acts.

The powers conferred by the S. L. Acts, 1882 to 1890, on a tenant for life are indestructible, and after a resettlement can be exercised by him whether his life estate under the original settlement is or is not restored; *Re Mundy and Roper*, (1899) 1 Ch. 275. See this discussed and explained in 43 Sol. J. pp. 652, 669.

The disentailing assurance.

By the disentailing deed, the father "as settlor," so as to imply a covenant for further assurance (*ante*, p. 311), and the son "as settlor," with the consent of the father as protector of the settlement, according to their respective estates and interests in the premises, grant to A. B. and his heirs [*parcels*] *habendum*, to A. B. and his heirs, "subject and without prejudice to the uses and estates limited" by the original settlement "which are prior" to the son's estate tail other than the father's life estate, and "to the powers annexed to such preceding uses and estates, and the uses and estates limited in exercise of such powers." The latter words have reference to the mother's jointure and the several terms in the original settlement, and the powers annexed to them. The deed proceeds: "But freed and discharged from the said estate tail, &c.," to such uses as the father and son shall jointly appoint, or as the son shall, after the death of the father, appoint, and in default of appointment, to the subsisting uses of the original settlement.

It will be observed that, until the joint power of appointment contained in the disentailing assurance is exercised, the father's life estate is not alienated or charged, and that consequently he can exercise all the powers in gross and

(*t*) *Re Wright and Marshall*, 28 Ch. D. 93.

appendant to his life estate in the original settlement as well as those conferred on him by the S. L. Acts in respect of that settlement.

The resettlement. The resettlement contains recitals of the original settlement, the interim dealings with the property, the state of the family, the disentailing assurance (or where the interim dealings with the property are numerous and complicated, a short recital of the effect of the original settlement, the interim dealings, and the disentailing assurance), and the agreement for the resettlement; and the operative part consists of a joint appointment by father and son to the uses, &c., thereinafter declared (see form in 2 K. & E. 665). The uses declared are (in the case that we are considering) those of the original settlement until the solemnisation of the son's marriage, and afterwards the limitations are to the use that the son and his assigns may, during the joint lives of the father and son, take a rentcharge, &c.; and subject thereto to the use of the father and his assigns for his life in restoration of the life estate limited to him by the original settlement, with remainder to the son for life, with remainder to his sons successively in tail, with remainders over. Powers are given to the son to limit a jointure rentcharge (*ante*, p. 385) in favour of any wife whom he may marry, and to enable her to limit a term for securing it collaterally (the amount of the jointure, in case the son dies in his father's lifetime, being often made larger on the father's death), and to charge portions in favour of the son's younger children, and to limit a term to secure them. The resettlement also contains the usual powers of management during minority, leasing, sale and exchange, &c.; or, if they are omitted in reliance on the C. A. 1881, and the S. L. A. (*ante*, p. 402), such provisions varying or extending the statutory powers as may be necessary. (See *ante*, pp. 421 *et seq.*)

Preservation of powers. In a subsequent part of the resettlement is contained a declaration (if it be so intended) that nothing therein contained shall prejudice the powers exercisable by the father

under the original settlement, or such of them as it is intended to preserve, and that the uses, &c., contained in the resettlement shall be overreached by any exercise of such powers, and that all lands to be purchased with moneys arising under the original settlement shall be settled to the uses subsisting by virtue of the original settlement and the resettlement (2 K. & E. 655). If it be intended to destroy the express powers annexed to the father's life estate in the original settlement, he should expressly release them; and the life estate given to him by the resettlement will not be expressed to be in restoration of his life estate under the original settlement.

The deed providing pin-money, jointure, and portions.

By the third deed the son exercises the powers, given to him by the resettlement, of charging a jointure and portions, and limits a term to secure the portions (2 K. & E. 671). It will be observed that no provision is made in the resettlement for the pin-money of the intended wife. This is effected by the son's assigning his annuity during his father's lifetime to trustees, for the purpose of securing the payment of the pin-money, and by his limiting a rent-charge to her by way of pin-money after the death of the father during the joint lives of the son and the intended wife.

Demise of son's life estate effected by bargain and sale.

It was the practice in deeds before 1883 for the son to demise his life estate to the trustees for the purpose of securing the pin-money; but this is now unnecessary, by reason of the provisons of the M. W. P. A. 1882, and the C. A. 1881 (*ante*, pp. 370, 373). It will be observed that, if the son had effected the demise to the trustees by means of a demise operating at Common Law, they would only have taken an *interesse termini* (*ante*, p. 250). To prevent this, the son for a nominal pecuniary consideration bargained and sold his life estate to the trustees for a term determinable on his death: thus raising a use in their favour, which, as the interest intended to be passed to them was not a freehold, took effect without the deed being inrolled.

Analysis of operative clauses in resettlement:— Analysis of resettlement.

1. Appointment by the father and son of [*parcels*]. [If the resettlement is not made on the son's marriage, to such uses as they shall jointly appoint; and in default of appointment—]
2. To the use that the son shall receive, during the joint lives of himself and his father, a rent-charge;
3. To the use of the father for life. If the powers in the original settlement are to be kept alive, say, in restoration of his life estate under the original settlement;
4. If so arranged, limitation of additional jointure to the father's wife;
5. To the use of the son for life;
6. To the use of his sons successively in tail;
7. To the use of the father's second son for life;
8. To the use of the second son's sons successively in tail;
9. Similar provisions for the other sons and their issue;
10. Ultimate remainder in fee.
11. Power to son to jointure any wife, and to give her the usual powers of distress and entry, and to limit, or to authorise her to limit, a term to secure the jointure.
12. Power for subsequent tenants for life to jointure (as in last clause).
13. Proviso that no jointure charge made by a subsequent tenant for life shall take effect unless the person charging or his issue come into possession.
14. Estates not to be liable at one time for more than a certain sum for jointures.
15. Power for son to charge portions and to limit a term for securing them.
16. Power for subsequent tenants for life to charge portions and to limit a term for securing them.

17. Proviso that no portions charge made by a subsequent tenant for life shall take effect unless the person charging or his issue come into possession.
18. Estates not to be chargeable with more than a certain sum for portions.
19. Power to trustees of terms to accept other security.
20. For other provisions, see analysis of settlement, p. 366.
21. Declaration that express powers of the original settlement shall overreach the uses of the resettlement. Or, Release of the express powers of the original settlement.
22. Appointment of trustees of compound settlement (see 2 K. & F. 649, 43 Sol. J. 658, 669, *ante*, p. 415).

Analysis of deed as to pin-money, jointure, and portions.

Analysis of deed providing pin-money and jointure for the wife and portions for the younger children:—

Parties:

A. B. intended husband (1); C. D. intended wife (2); P. T. and Q. T. trustees (3).

Recitals:

1. The intended marriage.
2. The resettlement, showing that A. B. takes an annuity (rentcharge) during the joint lives of himself and his father, that he is tenant for life in remainder, and that powers of jointuring and charging portions are vested in him.
3. The agreement to secure the pin-money, and to charge a jointure and portions.

Operative clauses:

1. Assignment by A. B. "as settlor" of the annuity rentcharge to P. T. and Q. T.
2. Declaration that the trustees shall hold the annuity upon trusts to raise pin-money for C. D.
3. Limitation of rentcharge by A. B. "as settlor" after the death of the father to C. D. during the joint lives of C. D. and A. B. by way of pin-money.

4. Charge of jointure by A. B. "as settlor;" if the resettlement was made before 1882 the usual powers of distress and entry.
5. Charge of portions by A. B. "as settlor" with maintenance in the meantime.
6. Limitation of term by A. B. "as settlor" to commence on the death of the survivor of A. B. and his father to secure the portions; and, if the resettlement was made before 1882, to secure the jointure.

In this scheme of resettlement, no provision is made for the son's children till after the death of both the son and his father, so that, if the son dies in his father's lifetime leaving a young family they may be unprovided for. In most cases the risk may be run, for probably their mother will support them out of her jointure; and, if she dies, they will have the benefit of any personal property settled on her marriage. If, however, there is no such property, they will be dependent on the bounty of their relations. If it be thought necessary, a power may be inserted in the resettlement, enabling the son to create a charge on the estate, to take effect after the deaths of himself and his wife during his father's lifetime, with sums for the maintenance of the children, a power which he will exercise by the third deed. Sometimes, if the resettlement is made on the son's marriage, his annuity is expressed to continue during his father's life, or so long during the father's life as any of the son's issue shall be alive; so that the son can provide for his children after his own death by means of the annuity.

## CHAPTER XIV.

### REGISTRATION OF TITLE UNDER THE LAND TRANSFER ACTS, 1875 AND 1897.

Presumption as to ownership of land.

APART from the Land Transfer Acts, 1875 and 1897 (38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65), a person in possession of land is presumed by law to have a right to the possession as owner in fee simple (*aa*). If a person out of possession claims to be entitled to the possession of the land, either as owner or otherwise, he must prove his case; or, as it is sometimes stated, the plaintiff in an action to recover the possession of land must recover by the strength of his own, not by the weakness of the defendant's title (*a*). But in the case of land which is registered under the L. T. Acts the registered proprietor has, except as against certain persons, an estate in fee simple in possession; and the result is that, if he is out of possession and brings his action to recover possession, the presumption of ownership is reversed, and that the person in possession will have to prove his title.

Reasons for investigating title.

The presumption that, in the case of unregistered land, the person in possession is the beneficial owner in fee simple with a right to possession may be rebutted by proof that he is only tenant for life, or in tail, or for years, or a trustee, or that the land is subject to incumbrances or leases, or that he is a mere trespasser. It follows that a purchaser cannot safely assume that the person in possession can convey the land for an estate in fee simple in possession; he must ascertain the extent and nature of his vendor's interest in the land: and this process is called the investi-

Proof of title.

(*aa*) See Lightwood on Possession, 106.

(*a*) M. L. R. P. 8.

gation of title. The vendor, therefore, furnishes to the purchaser an epitome of the instruments and facts which show that he is the owner, or has power to dispose of, the interest that he has agreed to sell, and this epitome is called the abstract of title. The vendor must verify the abstract, *i.e.*, prove, by the production of the instruments and evidence of the facts appearing on the face of the abstract, that the statements in the abstract are correct.

This is necessarily an expensive operation, as it requires the employment of highly skilled labour; and one of the objects of the L. T. Acts, 1875 and 1897, is to avoid the necessity of furnishing and verifying the abstract (*b*), and to substitute simple inspection of a register for elaborate investigation of title. It is impossible in this place to do more than give a general account of the provisions of these Acts (*c*).

What is capable of registration.

Hereditaments corporeal and incorporeal (L. T. A., 1897, s. 24) (*d*) of freehold tenure, and leases and subleases of freehold land (L. T. A., 1875, s. 11, L. T. A., 1897, sched.), with some exceptions, are capable, but copyholds and leases and subleases of copyholds are not capable, of being registered (L. T. A., 1875, s. 2). The exceptional cases where leasehold interests in freehold land are incapable of registration are, (1) where the term was created for mortgage purposes (L. T. A., 1875, s. 11, amended by L. T. A., 1897, sched.), and (2) where the unexpired residue of the term does not exceed 21 years, and (3) where the lease contains an absolute prohibition against alienation (L. T. A., 1875, s. 11). Where a lease and a reversionary lease of the same land belong beneficially to the same person, such leases are, for the purposes of s. 11 of the L. T. A., 1875, deemed to create one continuous term (L. T. R. 56).

(*b*) See L. T. A., 1897, s. 16.

(*c*) The practitioner is referred to the treatises of Messrs. Brickdale and Sheldon and of Messrs. Cherry and Marigold on the Acts.

(*d*) See also as to registration of special hereditaments, L. T. A., 1875, s. 82, amended by L. T. A., 1897, sched., and L. T. R. 61—67.

Compulsory registration.

Under the L. T. A., 1897, s. 20, Orders in Council dated the 18th July, 1898 (*e*), the 20th October, 1898 (*f*), and the 28th November, 1899 (*ff*), have been made by which registration of title to freehold land, and (subject as below stated) to leasehold land, situate in defined areas in the county of London, is made compulsory (*g*) on sales, or on the grants of leases or underleases, on and after the days respectively mentioned in the schedule to the Order of the 18th July, 1898, as varied by the Orders of the 20th October, 1898, and the 28th November, 1899.

The operation of the above Orders extends (L. T. R. 58, 59) to an assignment on sale (*h*) of a lease or underlease having at least 40 years to run or two lives yet to fall in, and to a grant of a lease or underlease (*h*) for a term of 40 years or more, or for two or more lives, executed after the respective dates fixed for compulsory registration of freehold land.

In places where registration is compulsory on sale, a purchaser of freehold land, or an assignee on sale of a lease or underlease, or the grantee of a lease or underlease, if, in either case, the lease or underlease comes within the provisions of L. T. R. 59, as above stated, does not, under the conveyance, or assignment, or lease, acquire the legal estate, unless or until he is registered as proprietor of the land, or the lease or underlease (*i*).

Who may apply for registration.

Registration can be applied for (see L. T. A., 1875, ss. 5, 11 and 68, and L. T. A., 1897, sched. amending s. 11) (and

(*e*) See this Order set out in W. N. 1898, July 23, p. 263.

(*f*) See this Order set out in W. N. 1898, Oct. 29, p. 373.

(*ff*) See this Order set out in W. N. 1899, Dec. 9, p. 359.

(*g*) The Orders do not apply to incorporeal hereditaments, or to mines or minerals apart from the surface, or to a lease having less than forty years to run or two lives yet to fall in, or to an undivided share in land, or to freeholds intermixed, and indistinguishable from lands of other tenure, or to corporeal hereditaments parcel of a manor and included in a sale of the manor as such; L. T. A. 1897, s. 24 (1).

(*h*) See L. T. R., June, 1899 (rule 4), set out W. N. 1899, p. 239.

(*i*) See L. T. A., 1897, ss. 20, 22 (6); L. T. R. 59.

in each case whether the land is or is not subject to incumbrances), by the following persons (j), viz.—(1) a person who has contracted to buy for his own benefit the fee simple or lease (k), or sub-lease (l); but in these cases the application requires the consent of the vendor. (2) A person entitled for his own benefit at law or in equity to the fee simple, or lease (k), or sublease (l). (3) A person capable of disposing for his own benefit by way of sale of the fee simple, or lease (k), or sublease (l). (4) A person holding land on trust for sale. (5) A trustee, mortgagee, or other person having power of selling the land. In cases (4) and (5) the application must be with the consent of any persons whose consent is required to the exercise by the applicant of his trust or power of sale (L. T. A., 1875, s. 68). A person included within classes (1), (2), or (3) may apply to have registered in his stead a nominee or nominees; and persons of classes (4) or (5) may authorize the purchaser to apply to be registered. It should be observed that as tenants for life (otherwise than under a settlement by way of trust for sale), and persons having the powers of a tenant for life under the S. L. Acts, have power to sell the land, they may apply for registration (m).

A person may apply to be registered either with an absolute or with a possessory title only (n).

Effect of registration with absolute title.

The effect of first registration of freehold land with an absolute title is to confer on the person registered, who is called "the first registered proprietor," the fee simple in the

(j) "Person" includes a corporation and any body of persons unincorporate; L. T. A., 1875, s. 4.

(k) I.e. for a life or lives, or determinable on a life or lives, or for a term of years of which more than twenty-one are unexpired; L. T. A., 1875, s. 11.

(l) See L. T. A., 1875, s. 11, amended by L. T. A., 1887, sched.

(m) See L. T. A., 1887, s. 8; L. T. R. 88—72. As to the registration of several persons entitled for their own benefit concurrently or successively, see L. T. A., 1875, s. 68; L. T. A., 1887, s. 14 and sched. amending s. 83 of L. T. A., 1875.

(n) See L. T. A., 1875, s. 5; L. T. R. 45. When registration is compulsory, registration with a possessory title only is sufficient; L. T. A., 1887, s. 20 (3).

land with its appurtenances, subject (1) to the incumbrances if any, entered on the register; and (2) to such liabilities, rights and interests, if any, as are by the Acts declared not to be incumbrances (*see post*, p. 521), unless there is any entry to the contrary on the register; and (3) where the first registered proprietor is not entitled to the land registered for his own benefit as between himself and persons claiming under him, to any unregistered estates, rights, interests or equities to which such persons may be entitled; but free from all other estates and interests whatsoever, including estates and interests of the Crown (L. T. A., 1875, s. 7).

The effect of first registration of leasehold land with absolute title is to vest in the first registered proprietor the possession of the land comprised in the lease for all the leasehold estate therein described, subject to the qualifications (1), (2) and (3) above mentioned in the case of freehold land, and subject also to all implied and express covenants, obligations, and liabilities incident to such leasehold estate, but free from all other estates and interests whatsoever, including estates and interests of the Crown (L. T. A., 1875, s. 13; L. T. R. 47).

Qualified title.

Where, on an application for an absolute title, it appears that the title can be established only for a limited period, or subject to certain reservations, an entry may be made on the register excepting from the effect of registration any estate, right, or interest, arising before a specified date or under a specified instrument or otherwise particularly described in the register (L. T. A., 1875, s. 9; L. T. R. 42; as to leaseholds, L. T. R. 49). A title of this nature is called a qualified title; and the registration has the same effect as registration of an absolute title, save that it does not affect the enforcement of any estate, right, or interest appearing by the register to be excepted. On the registration of any leasehold land held under a lease containing a prohibition against alienation without licence the registration must be with a qualified title only (L. T. R. 52).

Possessory title.

The registration of the first registered proprietor with a possessory title only does not affect or prejudice the enforcement of any estate, right, or interest, adverse to or in derogation of his title, and subsisting or capable of arising at the time of registration, but subject thereto has the same effect as registration with absolute title (L. T. A., 1875, s. 8, as to freeholds; L. T. R. 48, as to leaseholds).

The result appears to be that an inspection of the register, where the land is registered with absolute title will show, but where it is registered with possessory title will not necessarily show, the incumbrances existing at first registration; and that where it is registered with qualified title the result is the same as if it were registered with absolute title except as regards estates, rights and interests specifically excepted on the face of the register; and that in either case an incumbrancer whose rights are preserved does not lose the legal estate if it is vested in him.

Middlesex Registry.

It should be noted that land situate within the jurisdiction of the Middlesex or Yorkshire Registries, when registered under the L. T. Acts, is exempted from such jurisdiction; but the exemption does not apply to estates or interests excepted from the effect of registration under a possessory or qualified title, or to an unregistered reversion on a registered leasehold title, or to dealings with incumbrances created prior to registration (*n*).

Manner of applying for first registration.

Application for registration with a possessory title (L. T. R. 17) is made by delivering at the registry an application in the prescribed form (which can be obtained at the registry). There is no official investigation of the applicant's title; but as *primâ facie* evidence of it, the application must be accompanied by either (1) a conveyance on sale to the applicant, or (2) a statutory declaration in the prescribed form, stating that the applicant is in possession, and the nature of his interest accompanied by the latest

(*n*) L. T. A., 1875, s. 127, amended by L. T. A., 1897, Sched. I.; and see the Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), Sched. I., para. 14.

document of title (if any) in his possession or under his control. The application must in either case contain or be accompanied by sufficient particulars to enable the land to be identified on the Ordnance map. If the land is leasehold (L. T. R. 43, *et seq.*), the lease, where it is in the possession or under the control of the applicant, and in other cases a copy thereof, must be delivered with the application. It is not necessary to state in the application whether the land is subject to incumbrances (L. T. R. 18), but if any are so stated, they will be referred to in the Charges Register. Such documents of title as will, in the opinion of the registrar, when marked give notice of the registration to any person dealing with the land have, as a general rule (L. T. A., 1875, s. 72; L. T. A., 1897, sched.), to be produced to, and marked by the registrar (*n*).

Absolute title.

An application for registration with absolute title (L. T. R. 25 *et seq.*) must be accompanied by an abstract, and by all documents of title in the possession or under the control of the applicant, including opinions of counsel, abstracts, contracts for or conditions of sale, and a list of the tenants and occupiers (L. T. R. 29). The title will be examined by the registrar in accordance with the usual conveyancing practice; but the examination may be modified as the registrar thinks fit where the land has been sold under an order of Court, or where the title has been fully investigated on a recent purchase (L. T. R. 31). This power of modifying the examination of title will be found of great value in practice. In many cases the title accepted by a purchaser is good with the exception of those matters into which he is precluded from inquiring by the usual conditions of sale; and if, as will probably be the case, the registrar accepts the title on seeing the opinion of some well known counsel that it is good subject to the conditions, it will be easy and inexpensive to register the land with a qualified title.

The registrar has power to accept a good holding title (*o*).

(*n*) See the memorandum as to Registration in W. N. 1899, Sept. 30, p. 287.

(*o*) L. T. A., 1875, s. 17 (3).

No person can be registered as proprietor of leasehold land with absolute title until and unless the title both to the leasehold and the freehold, and to any intermediate leasehold that may exist, is approved by the registrar (L. T. R. 46).

Advertisements of the application to register with absolute title have to be inserted in the *London Gazette* and in certain newspapers; notices have to be served on the tenants and occupiers; any person may by notice delivered at the registry object to the registration; and any such objection is to be heard and decided by the registrar (L. T. R. 32 *et seq.*).

Land certificate.

Whatever be the nature of the title with which the land is registered, on completion of the registration a land certificate (*o*) is handed to the applicant or, if he prefers, left in the registry (L. T. A., 1875, s. 10; L. T. R. 39).

The land certificate is the only document of title to registered land. It certifies that A. B. is registered with absolute (or qualified or possessory) title of the (freehold or leasehold) land known as ——, with a reference to the office number of the title, parish, registration district, and county (L. T. R. 204, and form 61). Copies of the entries on the register, and of the filed plan of the land are annexed to it. The land certificate must be produced to the registrar on every entry in the register of a disposition by the registered proprietor, and on every registered transmission or rectification of the register; and a note of every such entry, transmission, or rectification is to be officially indorsed on the land certificate (L. T. A., 1897, s. 8). The registrar has power to authorize an officer of the registry, or a solicitor to inspect the land certificate elsewhere than at the registry, and to make the proper indorsement thereon (*p*).

Liabilities which are not incumbrances.

The liabilities, rights, and interests, which are by the Acts declared not to be incumbrances, are specified in the

(*o*) The "office copy lease" mentioned in the Acts is now superseded by a land certificate for leasehold land. See L. T. R. 55.

(*p*) See L. T. R. 208.

L. T. A., 1875, s. 18, as modified by the Schedule to the L. T. A., 1897. The most important of them are liabilities arising from tenure, succession and estate duties (*q*), land tax, tithe-rentcharge, easements, and *profits à prendre;* rights to mines and minerals and rights subsidiary thereto created previously to the first registration of the land or the commencement of the L. T. A., 1897; leases or agreements for leases and other tenancies for any term not exceeding twenty-one years where there is an occupation under the tenancy; and rights acquired or in course of being acquired under the Statutes of Limitation.

Statutes of Limitation—Effect of

The reference to the Statutes of Limitation requires some explanation. The L. T. A., 1897, provides (s. 12) that a title adverse to the title of the registered proprietor shall not be acquired by any length of possession, and that the registered proprietor may at any time make an entry or bring an action to recover possession of the land; but that the person who, but for the provisions of the Act of 1875 or of this section, would have acquired a title under the Statutes of Limitation, may apply to have the register rectified, and the Court may direct rectification without prejudice to rights acquired for value by registered assurance. The provisions of this section are not, as against any person first registered as first proprietor of the land with a possessory title only, to prejudice any adverse claim in respect of length of possession of any other person who was in possession of the land at the time of first registration. It should be noted that the rights of the person in possession at the time of first registration with possessory title are adverse to those of the first registered proprietor, and are expressly preserved by L. T. A., 1875, s. 8, and can be enforced even against a transferee for value from him.

Dealings with registered land.

The registered proprietor may deal with the land either by registered or by unregistered assurance, the effects of

(*q*) But see L. T. A., 1897, s. 13, protecting *bonâ fide* registered purchasers.

which are widely different. Registered assurances are (1) transfers, (2) charges.

Registered transfers (*q*).

A transfer of the land is made by an instrument in the prescribed form, which must be produced to the registrar for registration, accompanied by the land certificate, unless that is deposited in the registry. The operation is completed by entering the name of the new proprietor on the register, and making a note of such entry on the land certificate. If the whole of the land comprised in the title is transferred, the land certificate is delivered to the transferee. If part only is transferred, a new land certificate is delivered to him and the old certificate is retained by the transferor. The operative part of a transfer of freeholds (*r*), where the whole of the land in a title is transferred is "In consideration of —— pounds (£ ), I, A. B., of, etc., hereby transfer to C. D., of, etc., the land comprised in the title above referred to." It must be executed as a deed and attested by a witness (L. T. R. 156—158). The registrar has power to allow variations in the form (L. T. R. 146). It is understood that he will always allow the insertion of a receipt clause, the effect of which is to enable the transferor's solicitor to give a receipt for the purchase money on production of the transfer executed by the vendor (*ante*, p. 333), and the insertion of the words "in fee simple." Where the consideration is advanced by different persons in separate sums, or does not consist or wholly consist of money, its nature or the separate payments made may be concisely stated. (Note to form 14 in first schedule to L. T. R.) If more complicated variations are required, the draft should be submitted to the registrar.

Effect of transfer—absolute title.

A registered transfer for value of freehold land registered with an absolute title, confers on the transferee an estate in fee simple in the land (*s*), subject to the incumbrances,

(*q*) See L.T. A., 1875, ss. 29—39; L. T. A., 1897, s. 8; L. T. R. 79, *et seq.*

(*r*) L. T. R., first sched., form 14.

(*s*) Including mines and minerals, L. T. A., 1897, sched., amending L. T. A., 1875, s. 30.

if any, entered on the register, and, unless the contrary is expressed on the register, to the liabilities, rights, and interests which are by the L. T. A., 1875 (s. 18, as amended by L. T. A., 1897, sched.), declared not to be incumbrances, but free from all other estates and interests, including those of the Crown (*t*).

Qualified title.

A registered transfer of freehold land registered with qualified or possessory title has the same effect as if the land were registered with absolute title, save that it does not affect, in the case of qualified title, the rights or interests preserved by the qualification, and, in the case of possessory title, all rights or interests, adverse to the title of the first registered proprietor and subsisting or capable of arising at the time when he was registered. (L. T. A., 1875, ss. 31, 32.)

Possessory title.

Voluntary transfers.

A registered transfer of freehold land made without valuable consideration is, so far as the transferee is concerned, subject to any unregistered estates, rights, interests, or equities, subject to which the transferor held the same, but in other respects has the same effect as a transfer for value (L. T. A., 1875, s. 33; as to leaseholds, see L. T. A., 1875, s. 38).

Leaseholds.

A registered transfer of leasehold land implies, unless there is an entry to the contrary on the register, a qualified covenant by the transferor that the rent, covenants by the lessee and conditions, reserved and contained by and in the lease have been paid, performed, and observed up to the date of the transfer, and a covenant by the transferee for payment of the rent and performance of the covenants by the lessee and conditions, and for indemnity of the transferor in respect thereof (L. T. A., 1875, s. 39; L. T. R. 91.)

The effect of a registered transfer of leasehold land is the same as if it were freehold land, except that the transferee takes the estate described in the registered lease subject to all express covenants obligations and liabilities incident

(*t*) L. T. A., 1875, s. 30.

to such estate (L. T. A., 1875, s. 35; amended by L. T. A., 1897, sched., L. T. R. 92, 93).

Charges(*u*).

The provisons as to charges are contained in L. T. A., 1875, ss. 22—28; L. T. A., 1897, s. 9; and in L. T. R. 106—120 (*x*). It will be found that a registered charge is created by the registered proprietor executing a deed (in form 39, L. T. R., sched.), and by the entry on the register of the person to whom the charge is made as proprietor of the charge. On completion a certificate (*y*) of charge is delivered to him or deposited in the registry. The effect of a registered charge is to confer on the registered proprietor of the charge the right to exercise the powers conferred on mortgagees by the C. A. 1881. Subject to any entry to the contrary on the register, a covenant is implied by the person who is registered proprietor of the land at the date of the charge to pay the principal and interest, if any, at the appointed time and rate, and to pay interest half-yearly on the unpaid part for the time being of the principal (L. T. A., 1875, s. 23), and also in the case of leaseholds to pay, perform, and observe the rent and covenants of the lease, and to indemnify the proprietor of the charge and persons claiming under him against them (L. T. A., 1875, s. 24).

The charge may contain any of the stipulations mentioned in L. T. R., first schedule, form 39. If any other stipulations are required, a draft of the proposed charge should be submitted to the registrar.

Transfer of charge.

The registered proprietor of a charge may transfer the charge (L. T. A., 1875, s. 40) by a deed in form 44 in the first schedule to the L. T. R. He must produce the certificate of charge to the registrar (L. T. A., 1897, s. 8). The operation is completed by entering the transferee on the register as proprietor of the charge and by endorsing

(*u*) As to registration of the proprietor of an incumbrance created prior to the first registration of the land, see L. T. R. 121, *et seq.*

(*x*) Rule 109 was amended by L. T. R., June, 1899, set out in N.W., 1899, p. 239.

(*y*) The form is varied by L. T. R., June, 1899. See rule 9 (1), W. N. 1899, p. 239.

notice of the entry on the certificate of charge, and by delivering the certificate to him, or, if he prefers, depositing it in the registry.

A registered transferee of a charge, and his successors in title, are not to be affected by any irregularity or invalidity in the original charge, of which the transferee was not aware when it was transferred to him (*z*).

Deposit of certificate.

The registered proprietor of freehold or leasehold land or of a charge may, "subject to any registered estates, charges, or rights," create a lien on the land or charge by deposit of the land certificate or certificate of charge. The lien is equivalent to a lien created by the deposit of title deeds or of a mortgage deed of unregistered land by an owner entitled in fee simple, or for the term or interest created by the lease, for his own benefit, or by a mortgagee beneficially entitled to the mortgage (L. T. A., 1897, s. 8). The words "registered estates, charges, or rights," appear to mean estates, charges, or rights protected by an entry on the register; for, as no person except the registered proprietor has a registered estate in the land or charge, it is clear that "registered" must be used in some secondary meaning. It need hardly be added that rights which are not affected by the registration, as, for example, in the case of land registered with a possessory title, rights subsisting or capable of arising at first registration, are not rendered subject to the lien. It may be pointed out that, where the deposit is made by a trustee and the rights of the *cestuis que trust* are not protected by an entry on the register, the lien created by the deposit will have priority over those rights, because the lien is equivalent to the lien that would be created if the registered proprietor were entitled for his own benefit; whereas, if a trustee of unregistered land creates a mortgage by the deposit of the title deeds, the rights of the *cestuis que trust* prevail over those of the depositee (*see Manningford* v. *Toleman*, 1 Col. 670).

(*z*) L. T. A., 1897, sched., amending L. T. A., 1875, s. 40.

The depositee may, if the deposit is to secure money, give notice to the registrar of the deposit; and the latter is to enter the notice in the Charges Register, and to give a written acknowledgment of its receipt. The entry of the notice operates as a caution (L. T. R. 200—202).

It will be observed that, as the depositee has possession of the land certificate, and as no registered disposition of the land can be made without its production, no assurance can be registered without the consent of the depositee. If the depositee protects the deposit by notice entered on the register, any person taking under a subsequent unregistered assurance will, if he searches the register, have express notice of the lien of the depositee; and if he does not search, will probably be postponed to him on the ground of his negligence in not searching.

Unregistered assurances.

The 49th section of the L. T. A., 1875, provides that, "subject to the maintenance of the estate and right of the registered proprietor," any person having a sufficient estate or interest in registered land may create estates, rights, interests, and equities in the same manner as if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities, in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register notices, cautions, inhibitions or restrictions. The section provides also for the creation of unregistered interests in a registered charge subject to the maintenance of the right of the proprietor of the charge.

The meaning of the words "subject to the maintenance of the estate and right of the registered proprietor" is very obscure. It seems clear that, whatever estate he may have, the creation of an estate which takes effect out of his estate is *pro tanto* a diminution of that estate. The better opinion appears to be that the meaning of the words is that no unregistered assurance, whether made by the registered proprietor or a stranger, is to prevent the registered proprietor from dealing with the land (or charge) by registered

assurance except so far as he may be prevented from so doing by a registered notice, caution, inhibition or restriction.

Notice of lease (*a*).

The only unregistered assurance that can be protected by a notice is a lease or agreement for a lease of registered land where the term granted is for a life or lives, or is determinable on a life or lives, or exceeds twenty-one years, or where the occupation is not in accordance with the lease or agreement. On the registration of such notice the registered proprietor of the land and every person deriving title under him (except proprietors of incumbrances registered prior to the registration of the notice) are deemed to be affected with notice of the lease or agreement as being an incumbrance on the land.

On an application to register notice of a lease or agreement, the lease or agreement, with a copy thereof, and a copy of the plan (if any) thereon, and either the consent in writing of the registered proprietor of the freehold or of the superior lease out of which the lease or agreement is derived, or an Order of Court authorizing the registration of the notice must be delivered at the registry. (L. T. A., 1875, s. 51; L. T. R. 166.) And where the lease is by way of security for money advanced or to be advanced, the land certificate of the lessor or sublessor must be produced and endorsed with a note of the entry (L. T. R., June, 1899, r. 7 (2) (*aa*)).

Notices of dower and curtesy.

Notices of estates in dower and by the curtesy may be noted as incumbrances (*b*).

Caution against registered dealings.

Any person interested under any unregistered instrument (*c*) or otherwise in any land or charge registered in the name of another person may lodge a caution to the effect that no dealing be had by the registered proprietor until notice has been served on the cautioner warning

(*a*) See L. T. A., 1875, ss. 50, 51; L. T. R. 166, *et seq.*

(*aa*) See W. N. 1899, p. 239.

(*b*) L. T. A., 1875, s. 52; L. T. R. 170.

(*c*) L. T. A., 1875, s. 53; L. T. R. 188.

him that his caution will cease to have any effect after the expiration of fourteen days or such shorter period, not less than seven days, as the registrar may direct (L. T. A., 1875, s. 54; L. T. R. 190). The caution must be signed by the person lodging it or his solicitor, and must contain an address for service in the United Kingdom. It must be supported by a declaration made by the cautioner or his solicitor stating the nature of his interest and containing a reference to the land or charge.

Caution against entry of land on register.

A caution against first registration of land may be lodged by any person who has such an interest therein as to entitle him to object to any disposition thereof being made without his consent. It entitles him to notice of any application for registration of the land (L. T. A., 1875, s. 60). The caution must be supported by an affidavit or declaration stating the interest of the cautioner and the land to be affected by the caution. It must be signed by the person lodging the caution or his solicitor, must contain an address for service in the United Kingdom, and must refer to and be accompanied by sufficient particulars by plan or otherwise to identify the land on the proper Ordnance map (L. T. R. 74).

Inhibitions (*d*).

An inhibition is an order or entry inhibiting for a time or until the occurrence of an event named in the order or entry, or generally until further order or entry, any dealing with any registered land or registered charge; it may be granted by the Court, or, subject to an appeal to the Court, by the registrar. Examples of inhibitions, which will be granted as a matter of course in respect of settled land, will be found in forms 6, 9, 10 in the first Schedule to L. T. R.

Restrictions (*e*).

A restriction is an entry on the register made on the application of the registered proprietor of land or of a charge that no transfer of the land or charge shall be made unless

(*d*) See L. T. A. 1875, s. 57; L. T. R. 194, 195, 197, *et seq.*

(*e*) See L. T. A. 1875, ss. 58, 59; L. T. R. 196.

the following things, or such of them as the proprietor shall determine, are done, that is to say: (1) unless notice of any application for a transfer or charge is sent by post to a named address; (2) unless the consent of a named person or persons is given to the transfer or charge; or (3) unless some other matter or thing is done which may be required by the applicant and approved by the registrar. Restrictions can at any time be withdrawn or modified at the instance of all the persons appearing by the registry to be interested in such directions, and may be set aside by order of Court.

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